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In the matter of:

Digital Performance Right in
Sound Recording and Ephemeral
Recording

Docket No.

2000-9

CARP DTRA

1 & 2

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Monday
September 10, 2001

The above-entitled matter came on for hearing,
pursuant to notice, at 9:00 a.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON	Chairman
THE HONORABLE JEFFREY S. GULIN	Arbitrator
THE HONORABLE CURTIS E. von KANN	Arbitrator

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WASHINGTON, D.C. 20005-3701

ORIGINAL

APPEARANCES:

On Behalf of Clear Channel Communications, Inc.,
National Religious Broadcasters Music License
Committee, and Salem Communications Corporation

KARYN ABLIN, ESQ.
BRUCE G. JOSEPH, ESQ.
THOMAS W. KIRBY, ESQ.
DINEEN PASHOUKOS WASYLIK, ESQ.

of: Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-4913
(202) 719-7000

On Behalf of American Federation of Television
and Radio Artists

ARTHUR J. LEVINE, ESQ.
of: Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
1300 I Street, N.W.
Washington, D.C. 20005-3315
(202) 408-4032

On Behalf of the Association for Independent
Music

JACQUES M. RIMOKH, ESQ.
BARRY I. SLOTNIK, ESQ.
of: Loeb & Loeb, LLP
345 Park Avenue
New York, New York 10154-0037
(212) 407-4900

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APPEARANCES: (Cont'd)

On Behalf of BET.com; CBS Broadcasting, Inc.; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Everstream, Inc.; Incanta, Inc.; Launch Media, Inc.; Listen.com; Live365.com; MTVi Group, LLC; MusicMatch, Inc.; MyPlay, Inc.; NetRadio Corporation; Radioactive Media Partners, Inc.; RadioWave.com, Inc.; Entercom Communications Corporation; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind Media.com, Inc.; and Xact Radio Network, LLC

ADAM I. COHEN, ESQ.

MARK A. JACOBY, ESQ.

R. BRUCE RICH, ESQ.

FIONA SCHAEFFER, ESQ.

KENNETH L. STEINTHAL, ESQ.

of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8622

On Behalf of AEI Music Network; DMX Music, Inc.

SANDRA M. AISTARS, ESQ.

DAVID R. BERZ, ESQ.

of: Weil, Gotshal & Manges, LLP
1615 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 682-7272

On Behalf of the Recording Industry Association of America, Inc.

JOHN A. FREEDMAN, ESQ.

ROBERT ALAN GARRETT, ESQ.

HADRIAN R. KATZ, ESQ.

BRAD R. NEWBERG, ESQ.

RONALD A. SCHECHTER, ESQ.

JULE L. SIGALL, ESQ.

CHRISTOPHER WINTERS, ESQ.

MICHELE J. WOODS, ESQ.

of: Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5719

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APPEARANCES: (Cont'd)

On Behalf of Public Radio:

DENISE LEARY, ESQ.
of: Public Radio, Inc.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 513-2049

On Behalf of American Federation of Musicians of
the United States and Canada:

PATRICIA POLACH, ESQ.
of: Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

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C-O-N-T-E-N-T-S

WITNESS

DIRECT CROSS REDIRECT RECROSS

Steven Marks

By Mr. Garrett

9130

EXHIBIT NO.

DESCRIPTION

MARK RECD

RIAA

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1 P-R-O-C-E-E-D-I-N-G-S

2 (11:13 a.m.)

3 BY MR. GARRETT:

4 Q Mr. Marks, the first deal that you
5 successfully negotiated was with Music Music Music.

6 Correct?

7 A Yes.

8 Q And could you tell us a little bit about
9 Music Music Music.

10 A Sure. I believe the company launched in
11 late 1998 so they've been streaming for almost three
12 years now. They are somewhat of an international
13 company in the sense that I know that they're traded
14 on the Frankfurt Stock Exchange and they're often
15 adding -- I think Mr. Spegg who's the CEO often
16 travels internationally to set up websites in Saudi
17 Arabia, for example, to have Arab music and things
18 like that.

19 Their main offices are based in Toronto.
20 They do have some offices in the United States and
21 obviously in Europe as well.

22 They have been signing independent labels

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1 for parts of their service that are interactive
2 outside of DMCA and my understanding is that they're
3 hoping to launch a full blown interactive service some
4 time soon but they've been working on that for some
5 time and have had some interactive portions to their
6 site available almost since the beginning, I believe.

7 There's also some financial information on
8 them that was in my testimony where their annual
9 revenues were about \$600,000 last year. Approximately
10 70 employees. They have a number of different aspects
11 to their business. They have a B2B service where they
12 make background music transmissions to business
13 establishments which is something that was the subject
14 of part of the renewal license which we can talk about
15 later. They have an in store kiosk business. They
16 also have a technology part of the business that I'm
17 frankly not all that familiar about but I do know
18 exists.

19 Q Do you know whether they're profitable?

20 A No, I don't believe they're profitable
21 yet.

22 Q How many channels of music do they offer?

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1 A That I'm not sure. I know it's I think
2 more than 10 and less than 100, but I'm not sure of
3 the exact number. I don't know whether that --

4 CHAIRMAN VAN LOON: Your testimony says
5 170.

6 THE WITNESS: Sorry. I guess it's more
7 than 100.

8 BY MR. GARRETT:

9 Q And you have some further information on
10 them in Exhibit 127DP as well.

11 A I printed out just a couple of the screen
12 shots that I think are in the notebook. The two that
13 I have are pages one and four. I guess page one is
14 the homepage and you can see on the left hand side
15 they've got a number of different features, music
16 shows, music on demand. They have a feature that's
17 I'm the deejay where, as opposed to just selecting
18 individual songs for immediate playback, you can
19 actually select a number of songs and then have them
20 randomly put together in a play list. That's also
21 part of their interactive service and I think that the
22 other deejays section is making available a play list

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1 from others who do that as well.

2 And they've got the standard news on the
3 front page and some log-in information. Then on page
4 four I think it's just a picture of the song playing
5 and the player.

6 Q They also have the RIAA seal of good
7 approval.

8 A Yes. They have a license by RIAA in the
9 bottom right hand corner.

10 Q Tell us a little bit about the
11 negotiations with MMM. Did you contact them or did
12 they contact you?

13 A Well, they had contacted -- Mr. Spegg had
14 contacted me some time in the middle of 1998 around
15 the time of the amendments to the DMCA and I think he
16 just had some general questions and asked if we could
17 send him a copy of the new legislation which we did.
18 I think the next contact that we really had with him
19 was some time in December of 1998 which would have
20 been a couple of months, within a couple of months
21 after the DMCA took effect and we sent him some
22 information from our website.

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1 Right after the DMCA was passed, we put up
2 an FAQ, a frequently asked questions document on our
3 website describing what the statutory license is, the
4 terms of the statutory license, how it differs from
5 other licenses that might be necessary for a webcaster
6 to obtain, how to file your notice and become -- how
7 to file the notice with the Copyright Office, where to
8 send the notice, the amount of the check, that the
9 rate would be set either through negotiation or
10 arbitration if necessary. Just a general document.
11 I mean we got a lot of questions, not only at the
12 beginning right after it was passed but through a
13 couple of years. I think we could probably have one
14 person's time dedicated just to fielding questions
15 about statutory license or licensing generally or
16 things about the company. So that was our effort to
17 try and push people toward the website, at least to
18 answer some initial questions.

19 We sent that to Mr. Spegg in December and
20 then shortly after that we got an overture from Mr.
21 Spegg to begin negotiations for a license agreement
22 and I remember at the time one of the issues that

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1 arose was the fact that his company was based in
2 Canada and his servers were located in Canada and we
3 told him right off the bat that we wouldn't be able to
4 negotiate with him unless he was in the U.S.,
5 copyright law being territorial. Without getting into
6 technicalities about where performances are cognizable
7 for purposes of copyright law, the copies that he was
8 making and the servers at least required that they be
9 licensed and, therefore, we asked that -- we didn't
10 ask. We just said if you want to discuss this, you
11 need to move servers, and he did do that.

12 And then we started the negotiation
13 process and that began, I believe, some time in
14 February of 1999 when we got confirmation from him
15 that his servers had been relocated to the U.S.

16 And I can see, for example, that we sent
17 -- one thing that I should say at the outset while
18 we're -- before we get too deep into any of these
19 agreements is that a lot of the negotiations occurred
20 on the phone. Email was not used principally to
21 negotiate. I mean there were issues from time to time
22 that went back and forth, proposed language, obviously

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1 draft agreements. We used email as well as fax for
2 transmitting the draft agreements. But most of the
3 negotiations either happened in person, which was much
4 rarer, but many, many times it was over the phone. So
5 just in going through these documents, you can see
6 there's gaps where a couple of weeks or a month maybe
7 and the gap is that there were a number of discussions
8 in between on the phone about the terms of the
9 agreement. And I think that that's what happens here
10 in February in terms of the documents. In early
11 February we had some discussions with him and I think
12 that Mr. Spegg actually, we had a face to face meeting
13 in Washington in early February and then I sent on
14 February 17 an email to the negotiating committee
15 which included a description of their service, of the
16 RadioMoi service which was the name that Music Music
17 Music used for the radio portion of the site and some
18 proposed license terms that I had discussed earlier
19 with the committee but had become a little more
20 coalesced around our discussions with MMM directly.

21 So that appears. The Bates numbers are
22 13582. I'm not sure. These aren't necessarily in

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1 numerical order because of the production but--

2 Q They are in chronological order.

3 A They're all in chronological order.

4 Q So about 20 pages in or so you'll find the
5 document you just referenced.

6 A Right.

7 Q That was on February 17.

8 A Yes, February 17.

9 ARBITRATOR VON KANN: You said you sent
10 some proposed terms. There had been some discussion
11 with negotiating. This was your first serious
12 negotiation, I guess.

13 THE WITNESS: Correct. We had begun
14 negotiating with DiMA at this point but we hadn't
15 gotten --

16 ARBITRATOR VON KANN: And hadn't gotten
17 off the ground.

18 THE WITNESS: Yes. Right. And we hadn't
19 gotten nearly as far.

20 ARBITRATOR VON KANN: Before you went into
21 this first negotiation, had the committee through
22 conference call or otherwise said okay, these are the

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1 terms we're going to offer. This is the deal. Here
2 it is. Marks, go out and get these deals. Had you
3 been given a set of -- I don't know what -- asking
4 terms or something by the committee before you began
5 your dialogue with RadioMoi?

6 THE WITNESS: The answer is yes. We had
7 discussions. I had discussions in January which is
8 when we kicked off kind of the substantive strategic
9 discussions with the negotiating committee and we
10 talked about -- once MMM had come to us and made this
11 overture to sit down, we discussed very specifically
12 the kind of license, what it would be based on, the
13 kinds of additional terms and that was the basis for
14 the term sheet that I was attaching here on February
15 17. So this was written up with the guidance of the
16 discussions that I had had with the committee.

17 At that time, we were focused on gross
18 revenues being the basis for the agreements, and that
19 was for a couple of reasons. One was it's common in
20 the industry to license copyrighted works, especially
21 sound recordings, on a percentage of revenue basis and
22 all of the companies had experience doing that and

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1 were comfortable doing that.

2 The other thing was that at this time most
3 webcasters were standalone music sites so we weren't
4 yet confronting a lot of the issues that we can
5 discuss later on about having sites where there are a
6 number of different things going on and how you parse
7 the revenues and looking for alternative pricing
8 models. So we were focused on gross revenues. Mr.
9 Spegg thought that that was appropriate and,
10 therefore, we moved forward with that kind of term
11 sheet.

12 The term sheet here includes a 15 percent
13 of gross revenues, a little description. We'll go
14 through the agreement I think later and you can see
15 that the definition of gross revenues is much broader
16 than this and was important to us. We had left blank
17 a minimum royalty. A minimum fee was something that
18 was very important to us. It was not only something
19 that was in the statute and something that we wanted
20 in the statute but given that a lot of these
21 businesses were start up businesses and especially
22 where we were looking at a percentage of gross

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1 revenues model, we wanted to ensure that there was
2 some minimum that was going to be paid to us that
3 reflected the value of our music in the event that not
4 a lot of revenues were garnered or being derived from
5 the service at that time.

6 So there's a place holder for a minimum
7 royalty in this term sheet. After that there are a
8 number of other bullets that discuss additional
9 consideration that the companies thought was important
10 and were hoping to achieve in the negotiations. One
11 is data. Another is a public service announcement so
12 that we could have an industry public service
13 announcement on the website from time to time.

14 The third was providing links to sound
15 recording copyright owner websites. You can see I had
16 a place holder in there. Are there other promotional
17 activities we should ask for? This was still while we
18 were discussing that kind of item with the companies.

19 The issue of a most favored nation clause
20 had come up and our initial reaction was we really
21 didn't want to give most favored nation clauses.
22 They're just very difficult to apply and we thought

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1 that the negotiation should kind of stand on its own.
2 So we had no MFN. We were talking with MMM about it
3 and you can see that the way we were envisioning MFNs
4 was that if the statutory license when it was set,
5 however it was set, and we were at that time assuming
6 it was going to be through the negotiations, differed
7 in some respect. It's really not an MFN. It's more of
8 a rate adjustment mechanism so that if it were off by
9 -- this was really a safety valve. We wanted to build
10 in some protection that if things really went awry
11 that we weren't disadvantaging the licensee by having
12 signed this agreement or we weren't being
13 disadvantaged, and that was something that came up in
14 a number of our negotiations which was the issue of
15 having this kind of MFN or rate adjustment mechanism
16 vis a vis the eventual statutory rate.

17 Our feeling about it was always twofold.
18 One was that there should be some kind of rate
19 adjustment as opposed to a straight the rate becomes
20 X and second, it should go both ways meaning that if
21 the rate were set higher than what we had agreed on,
22 we should get the benefit of that and just as they

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1 might get the benefit if it were lower. Frankly, in
2 most instances, it was that latter thing that led the
3 licensees or the people we were discussing with to
4 drop it. They didn't want it. They didn't want it to
5 go either way and it just kind of went. That probably
6 happened five to seven times in the course of the
7 negotiations we had.

8 ARBITRATOR VON KANN: Maybe I'm misreading
9 it. I don't see that here in the carryover sentence
10 at the bottom of N13585. It looks to me like he gets
11 out if it's more than four percent lower. It doesn't
12 say anything about you get out if it's higher.

13 THE WITNESS: Right. And that's becaUse
14 you can see there's a question mark. What happened
15 was Mr. Spegg raised it and I was sending this to the
16 company saying basically putting down his request to
17 us and so this is before we actually negotiated that
18 term with him. And our response was as I said.

19 ARBITRATOR VON KANN: Are these his
20 proposed terms or yours?

21 THE WITNESS: They were proposed terms
22 that we had -- it was kind of a mixture. Mainly a

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1 proposed term sheet based on the guidance that we had
2 from the negotiating committee, but also based on our
3 discussions with Mr. Spegg. So for example, the 15
4 percent was something that he had agreed to. We were
5 there on that. We were there -- I mean the gross
6 revenue definition was expanded much more in the
7 agreement but there are questions in there that still
8 needed to be answered which was why I was going back
9 to the committee saying we need to discuss these
10 issues. And that, for example, was one that he had
11 raised.

12 Thereafter, there's a number of terms on
13 the ephemeral wording license. Initially we were
14 envisioning that as entirely separate percentage of
15 revenue rate. Again, a place holder for the minimum
16 royalty. They at the time were talking about having
17 this service that made transmissions to business
18 establishments. In the end, that was a service that
19 they didn't launch until much later and, therefore,
20 didn't get woven into this set of negotiations or this
21 set of agreements. It came up later, and we've done
22 a renewal that includes that.

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1 And then there are payment terms under #3
2 that included monthly payments, various late fee
3 charges, reporting requirements that included monthly
4 financial statements. So for example, they couldn't
5 just send a check. They needed to send a check with an
6 actual license fee report that showed the revenues and
7 how they got to the number and also reporting and
8 record keeping in terms of the usage of sound
9 recordings.

10 Auditing provisions and a term of the
11 license through the end of 2000 and then the other
12 customary just refers to things like form and other
13 issues that appear at the end of all of our licenses.

14 So that's where we were in mid-February
15 based on the discussions that I had had with Mr.
16 Spegg after first discussing things with the committee
17 and then here we were following up with the committee
18 to get sign off and questions answered in terms of the
19 various open issues.

20 Thereafter some of the focus was on what
21 minimum fee would be appropriate and we talked about
22 a number of dollar amounts, flat dollar amounts. So

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1 the next page Mr. Spegg is offering \$10,000 for one
2 year, \$25,000 for another year, and we --

3 MR. STEINTHAL: Can I impose now the
4 objection that this is exactly what's happening.
5 There's no question. We picked a time, February 17
6 when there's a term sheet and now the witness is just
7 paging through the negotiation binder that's been
8 produced to him by his counsel rather than being asked
9 questions to which he can respond if he has a
10 recollection. I think it's valuable for the panel and
11 valuable for me whether this witness has an
12 independent recollection of these events. If he
13 doesn't, I think it's important that he's got to go
14 back to the binder to answer the questions. It's
15 something we're entitled to know. Does he remember
16 it? Is it something that was important that stood out
17 in his mind or does he really have to go to the binder
18 to answer a question? I just really have a problem
19 with him testifying by leafing through a binder of
20 materials not in evidence.

21 MR. GARRETT: This proceeding is not a
22 test of Mr. Marks' memory. The issue that the other

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1 side has raised here concerns the circumstances under
2 which these agreements were negotiated and the best
3 way for Mr. Marks to provide evidence about those
4 circumstances is to do precisely what it is that he's
5 doing. I don't think he's just leafing through. I
6 think he's also trying to tell you the things that
7 were important to him as he can recall them by looking
8 at these documents. But this should not be a memory
9 test.

10 CHAIRMAN VAN LOON: The objection is
11 overruled. We have had a number of instances where
12 witnesses for both sides have testified with some
13 notes that they brought as a personal memory tool.
14 And we think that this is somewhat equivalent to that.

15 We're looking at 26 agreements over a
16 period of two and a half years. We could make a more
17 time-consuming process of this. Was there an e-mail
18 on the 17th? What did it say? What did it embrace?
19 But we're -- there's not a jury here. We're trying to
20 get, as efficiently as we can, to the truth of things.
21 And it is helpful to know, at the same time, what you
22 can remember, what stands out in your mind independent

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1 of the documents.

2 MR. STEINTHAL: Can I ask, Your Honor,
3 that as he's leafing through documents we get a
4 specific designation, if he's looking at something, as
5 to what the Bates stamp number is and what the date
6 is?

7 CHAIRMAN VAN LOON: Yes, I think that that
8 is important, because I know at one point you had gone
9 several pages beyond the Bates stamp number that was
10 -- it took a while for us to figure it out. And there
11 was an attachment referred to on the front page of the
12 Bates stamp, the e-mail, but --

13 So you were at the point of saying that
14 the discussion was focusing on what the amount of the
15 minimum fee should be.

16 THE WITNESS: Right.

17 CHAIRMAN VAN LOON: And how you determined
18 that.

19 THE WITNESS: And that was -- that was in
20 late February.

21 BY MR. GARRETT:

22 Q Of '99?

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1 A '99, right. And, you know, there were
2 discussions going back and forth around this time
3 fairly regularly from -- between me and Mr. Spegg and
4 then me and the companies in trying to come to an
5 agreement on all of these additional issues, not only
6 the monetary issues but the other terms of the
7 agreement.

8 And I think that that's reflected
9 variously in some of these e-mails going back and
10 forth around that time. There is an e-mail on --
11 that's Bates Number 8089 on March --

12 CHAIRMAN VAN LOON: 8089?

13 THE WITNESS: 8089. And this was another
14 term sheet that included more specific information
15 after some of those discussions that I just described
16 between --

17 BY MR. GARRETT:

18 Q Excuse me, Mr. Marks. 8089 was, in fact,
19 sent on March 1st, 1999, is that right?

20 A Yes.

21 Q So we're probably about 30 or so pages
22 into the document, then?

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1 A Yes. And that attaches the term sheet
2 behind it that's dated March 1st and has the 15
3 percent number, the definition of gross revenues that
4 was there. It now has the minimum royalty filled in
5 of \$50,000 for basically a 14-month period, and then
6 \$75,000 for the last year of the agreement, which
7 would have been 2000, has specific information about
8 what kind of data, what kind of reporting.

9 You can see the data includes various
10 information on listenership and the listeners. There
11 are -- the usage reporting information below that,
12 that is essentially a play list that has the title,
13 the artist, the album, the label, and all of that
14 other information, which is very important to us so
15 that we can distribute accurately.

16 It has a definitive provision for
17 providing us public service announcements, links to
18 websites of the copyright owners, a link for -- to
19 enable somebody to purchase a recording, a buy button.
20 That was in the agreement.

21 The next bullet talks about this "I Am the
22 DJ" feature. And we had some concern that --

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1 CHAIRMAN VAN LOON: Is that on 8091?

2 THE WITNESS: Oh, I'm sorry. 8091 I'm on
3 now, yes. We wanted to make sure that that was
4 limited to recordings that they had separate
5 interactive licenses for, because it -- that kind of
6 feature appeared to us to be very much like an
7 interactive or personalized service, because people
8 were picking songs and saying, "Hey, I want these
9 particular songs to be in the play list." So he had
10 agreed to that. It wasn't really ever an issue in the
11 discussions.

12 There are survey provisions where we could
13 undertake a survey of their listeners, but limitations
14 on the amount of times we could do that. You can see
15 the most favored nation was just dropped, and it says
16 here "due to the short term of the license." I
17 suspect that was the reason, although I can't recall
18 specifically that issue.

19 And then, moving on to the ephemeral
20 recording, we initially had a royalty rate of five
21 percent with a proviso that -- it's really a one
22 percent in here, provided that up to four percent

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1 would be credited against the payment of the 15
2 percent for the performance. So it was really just a
3 one percent agreement, some other issues regarding the
4 ephemeral --

5 ARBITRATOR GULIN: What was the purpose of
6 doing that?

7 THE WITNESS: I'm trying to remember that.
8 I think what it was was that we were trying to value
9 the -- valuing the ephemeral license for the
10 webcasters has not been an easy thing. We thought
11 about, should we do it per copy, you know, a certain
12 number, certain payment per copy. So somebody who had
13 200,000 copies or 200,000 recordings would be paying
14 more than somebody else.

15 Then, we thought of trying to -- what
16 percentage of revenues -- what's the value there. And
17 I think what we were thinking of here was that the
18 value is really five percent, but that given that they
19 were paying 15 percent, we didn't want to have -- we
20 didn't think the value of the entirety was 20
21 necessarily.

22 It was -- we were satisfied with 16, but

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1 I -- I think at the time we were just trying to
2 preserve that -- it wasn't that we thought the
3 ephemeral was only worth one percent. We thought it
4 was worth something more. But in the context of this
5 deal, it would be something else.

6 The way we ended up -- and we'll see this
7 later on thinking about the ephemeral license -- was
8 just that instead of tying it to the number, or tying
9 it to the specific -- a specific percentage of
10 revenues, was just to think, what is the value of the
11 ephemeral to the webcaster in relation to the
12 performance license?

13 And we thought it was about 10 percent.
14 So we basically have tacked on a 10 percent
15 additional, and that could be additional flat-fee
16 payment, additional per performance payment,
17 additional percentage of gross revenues. We'll see
18 that in later agreements, but that's where we ended up
19 on that.

20 34 --

21 ARBITRATOR VON KANN: Just a minute. Not
22 to quibble with you, but you've tacked on about seven

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1 percent or something, haven't you? Wouldn't it be
2 one-fifteenth? If they're paying 15 percent for the
3 other thing, and they have to pay one percent on top,
4 they're paying one-fifteenth of whatever the other is.
5 One-fifteenth is about seven percent, I guess, six and
6 a half, seven. So it doesn't seem to be exactly 10.

7 THE WITNESS: It's a story in progress.

8 ARBITRATOR VON KANN: Okay.

9 (Laughter.)

10 THE WITNESS: I didn't mean to be cute.

11 ARBITRATOR VON KANN: Right.

12 THE WITNESS: I mean, it ended up at
13 something else, so -- and we'll see that.

14 Then we --

15 BY MR. GARRETT:

16 Q Mr. Marks, do you know in the final
17 agreement, the ephemeral agreement, what was the
18 royalty rate?

19 A It is two percent, two percent of the
20 revenues.

21 Q And you didn't do, in that final
22 agreement, what was proposed here in this term sheet,

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1 correct?

2 A No. With regard to the ephemeral, what we
3 ended up doing was having an entirely separate
4 ephemeral license agreement that had a separate rate
5 and separate terms, etcetera. So it wasn't woven into
6 the one. We've since woven them into one agreement,
7 because it's just much easier to do it that way.

8 The rest of the term sheet regards payment
9 provisions, reporting requirements, recordkeeping and
10 auditing issues, the term again, and just that
11 placeholder for other customary terms.

12 ARBITRATOR VON KANN: This was a term
13 sheet, if I get you, as to which the other side had --
14 some of which terms the other side had agreed to.

15 THE WITNESS: Many of which, yes.

16 ARBITRATOR VON KANN: And some of which
17 were still under negotiation. Is that --

18 THE WITNESS: Yes. That's correct.

19 Thereafter, I think a few days later, was
20 when we first sent them a draft agreement, which is
21 Bates 8099. So on March 5th, 1999, we sent them an
22 actual draft agreement. And that's attached to that

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1 e-mail, starting at Bates Number 8100.

2 And you could tell even -- even between
3 the time the term sheet was sent and this time, there
4 are some -- there was some negotiating, because I
5 believe the -- the minimum fee was dropped from
6 \$50,000 to \$30,000 for the initial 14-month period.

7 Q What page are you reading from now?

8 A That's page 2, which is 8101 Bates. And
9 in the definition of "minimum performance amount," it
10 says \$30,000 for that October 28th through the end of
11 -- October 28th, 1998, through the end of December
12 '99. So that was the result of -- that was the result
13 of some discussions that we had had with MMM.

14 Also, at this time, we had the ephemeral
15 woven into the agreement. We eventually broke it out,
16 because we thought it was easier. We then went back
17 and we regularly do it now, so that it's part of one
18 agreement.

19 I think it makes sense to delay going
20 through this draft and just go through the actual
21 final agreements to talk about specific provisions of
22 the license agreement.

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1 Q Is it fair to say that there were
2 additional drafts that were exchanged back and
3 forth --

4 A Yes.

5 Q -- here?

6 A Yes.

7 Q Over what period of time?

8 A Well, the agreement was finally signed in
9 early April. So this was March 5th. There were about
10 a month's worth of time where there would have been
11 further discussions, further draft agreements. I
12 can't recall exactly how many were exchanged, but
13 there were some that were.

14 You can see on -- for example, on March
15 12th, '99, which is Bates Number 8109, there is an
16 e-mail from me to Wolfgang with a revised license
17 agreement. And this was, again, from the period of
18 March 5th to March 12th, the result of further
19 discussions between us.

20 ARBITRATOR VON KANN: Are all of the
21 drafts going in one direction? That is, did you do
22 all of the heavy labor? You know, you'd have a phone

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1 call, and he'd say, "Now we've got to come from 50 to
2 30," so you'd change that on the word processor or
3 something. Did he send you any drafts?

4 THE WITNESS: In this particular
5 agreement, most of his edits were done over the phone.
6 In other agreements, we had drafts and redlines going
7 back and forth between the two sides. There wasn't
8 any rhyme or reason to that for this one. It just
9 happened to be that way. I don't think there's any
10 reason to go through the actual agreement again.

11 Let's see --

12 BY MR. GARRETT:

13 Q At some point in time, was there a
14 discussion about using expenses as a -- sort of a
15 minimum fee, or as a floor?

16 A Yes. That's what I was trying to see,
17 where that came up, because that I recall is one of
18 the main last issues that -- that came up, which was,
19 how to have an effective minimum fee, and there was
20 some discomfort on our side with just having a flat
21 dollar minimum fee, because it may not reflect the use
22 of the music entirely, or the value of the music to

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1 the site, if they had been making a lot of use of the
2 recordings, millions of performances potentially. We
3 weren't sure that just having a flat dollar amount
4 made sense.

5 So what we ended up moving to was a
6 greater of expenses -- revenues or expenses. And the
7 idea behind that was -- our thinking was, if you can
8 pay for everything else that it takes to make this
9 service available, and make this business available to
10 consumers, you should be able to pay some percentage
11 of that for the recordings that are the very basis of
12 the service. And it was just a different metric to --
13 to capture the value as essentially a minimum fee, and
14 that's what we moved toward at that time.

15 And it was some time in this time period,
16 I'm not sure exactly -- I've got a note here that it's
17 March 23rd, so let me try and get you to --

18 MR. STEINTHAL: You say you have a note
19 there?

20 THE WITNESS: I just have some notes on
21 the agreement, so I don't have to go through every
22 page.

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1 MR. STEINTHAL: I'd like, at the break, to
2 have a better look --

3 THE WITNESS: Sure.

4 MR. STEINTHAL: -- at that as well.

5 THE WITNESS: Sure.

6 ARBITRATOR VON KANN: N8145 is a March 23
7 -- the date on it.

8 THE WITNESS: I think it -- 8147 is the
9 one I've got here, so -- let me see if I can find
10 that. I apologize. This is somewhat unwieldy. The
11 numbers seem to -- I can't see it in here. So it may
12 have just been a typo on the notes that I have.

13 CHAIRMAN VAN LOON: Well, 8145 is dated
14 the 23rd.

15 THE WITNESS: 8145, that's another issue
16 that arose. It's not that same issue. Oh, I see what
17 it is. I'm sorry. It's 8153. This is one of the
18 things that Mr. Steintal was alluding to about
19 looking backwards on some of these e-mails.

20 Starting at the very bottom is -- where we
21 said to them, "We'd like to add to the agreement that
22 the fee would be the greater of," and there are some

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1 responses where he said, "Look, we've already got the
2 minimums in there. We can play with operating costs."

3 But he was raising some issues about what
4 costs would it actually cover, and there was this
5 issue about covering capitalized costs versus other
6 costs, and we went back and forth on that issue. I
7 relied on outside counsel for a lot of that, and
8 working with Mr. Stegg and his counsel, and then --

9 BY MR. GARRETT:

10 Q Did Mr. Stegg have counsel?

11 A He did have counsel. I don't remember who
12 it was, obviously, but he had counsel. He didn't have
13 counsel at the beginning of the discussions but
14 brought in counsel at some point in the middle of the
15 discussions.

16 ARBITRATOR VON KANN: When you had a
17 change like the 50- to 30,000, for example, which we
18 saw that reflected in the term sheet, was that
19 something that you had to go back to the committee and
20 get approval on right then? Or did the committee say,
21 "Well, put the best thing you can together, and let's
22 take a look at it once it's all" -- how actively were

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1 they involved in issue by issue, term by term?

2 THE WITNESS: I think it was different
3 from agreement to agreement. I think on this
4 agreement -- and I think it differed even within one
5 agreement as to the term or the issue that we were
6 talking about. On the ephemeral and that 30,000, I
7 can't remember whether I went immediately back to them
8 or whether I -- it came up on a phone call, for
9 example, on our weekly call, we just discussed it as
10 part of that call.

11 There is no e-mail from me to the company
12 raising that, so sometimes what happened was I would
13 have a call with one or two of the members of the
14 negotiating committee who I felt were good bellwether,
15 so that if they were really raising issues of, hey,
16 this doesn't sound right, I would know to slow down
17 the process, bring it up on a call, or send an e-mail
18 out to discuss it with everybody.

19 If, on the other hand, they said, "That
20 sounds about right. Keep doing what you're doing, and
21 then bring everything back," I would have -- I would
22 have done that.

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1 ARBITRATOR VON KANN: Okay.

2 THE WITNESS: There is another draft
3 agreement that went out on March 24th. There was a
4 redline of that that was attached, beginning at
5 Bates 13630, and I don't think it's -- you need to go
6 through every edit that was made, but you can see that
7 it was a number of different edits that were made.

8 Some of those resulted in the fact that we
9 were moving -- we were adding in the operating expense
10 formula, and we were also moving out I believe the
11 ephemeral. Others reflect specific suggestions and
12 compromises that we reached with musicmusicmusic.

13 BY MR. GARRETT:

14 Q The agreement was finally executed by you
15 and --

16 A Right.

17 Q -- MMM, correct?

18 A Yes.

19 Q When was it executed?

20 A On April 7th.

21 Q All right. So you had negotiations that
22 continued up until somewhere close in time to

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1 April 7th --

2 A Right.

3 Q -- 1999, correct?

4 A Right.

5 ARBITRATOR VON KANN: Were they in
6 operation at that time?

7 THE WITNESS: Yes.

8 ARBITRATOR VON KANN: Okay.

9 BY MR. GARRETT:

10 Q Were there any other principal issues that
11 you recall being discussed during that period?

12 A I think the only other principal issue was
13 regarding how to handle syndication. And Mr. Spegg
14 had talked about entering into agreements with other
15 websites where he was going to offer the content from
16 his site or his channels in a co-branded manner,
17 meaning that you might go to a third party site and
18 there would be a co-branded player available that
19 somebody could start listening to music on.

20 And we were not comfortable including that
21 in a gross revenue type of agreement, because there
22 were all kinds of issues about how you can capture the

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1 revenues from that other site. We didn't know what
2 that other site was going to be, how -- whether music
3 was really driving traffic to that other site, and,
4 therefore, there were revenues that maybe we should
5 participate in.

6 There were -- the partnership agreements
7 between the -- between MMM and that third party site
8 we wanted -- we would want to ensure that we were
9 getting a license fee off of the top of whatever
10 revenues were coming in as a result of the advertising
11 that -- on the player, for example.

12 So that if they had a revenue share
13 agreement, where it was split 50/50, we wanted to get
14 a percent -- we wanted to make sure that we got a
15 percentage of the 100 percent and not the 50 percent.
16 There were all kinds of issues like that that came up.

17 In the end, the way we handled it was Mr.
18 Spegg said, "This is something we're just thinking
19 about. I don't think we're going to be doing it for
20 a while. Let's just move ahead, get the agreement
21 done, rather than looking for an entirely new
22 structure and taking, you know, many steps backward in

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1 terms of going through new drafts and negotiations
2 that had been over three months at this point.

3 So I believe the final agreement includes
4 something that doesn't allow them to do that kind of
5 programming.

6 Q All right. Why don't we turn to the final
7 agreement, which is included as 060 DR.

8 ARBITRATOR VON KANN: That's not in this
9 package or it is in the package?

10 MR. GARRETT: It's one of the -- it's --

11 ARBITRATOR VON KANN: From the earlier --

12 MR. GARRETT: It's what we submitted as
13 part of our direct case.

14 Mr. Chairman, we could make it easier by
15 taking these back from you for the time being here.
16 But we're happy to keep piling them up on your --

17 CHAIRMAN VAN LOON: No, that's welcome.

18 ARBITRATOR VON KANN: Can I just ask you
19 a question, Mr. Garrett?

20 MR. GARRETT: Yes.

21 ARBITRATOR VON KANN: You have four
22 volumes on this guy. We've been about three-fourths

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1 through the first volume. So I'm sort of curious as
2 to what --

3 MR. GARRETT: Less than halfway.

4 ARBITRATOR VON KANN: Maybe I -- where's
5 the rest?

6 MR. GARRETT: Well, that's fine.

7 BY MR. GARRETT:

8 Q Mr. Marks, why don't you explain what else
9 is included in these volumes here?

10 A Yes. Sure. A lot of it -- I think I
11 misspoke, by the way. The agreement was executed on
12 the 26th of April, not the 7th of April. There were
13 a number of drafts that went back to -- back and forth
14 the last few weeks. They also sent us a prospectus of
15 their business, which is about 100 pages somewhere in
16 here, that has financial statements and descriptions
17 of their business plan, and things like that, more
18 redlines. I think most of it, frankly, is -- is
19 redline agreements and revised drafts.

20 Q Okay. Do you know how many agreements
21 were actually -- how many drafts you actually went
22 through in that?

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1 A It looks like there are about 10 in here.

2 Q Okay.

3 ARBITRATOR GULIN: Let me just ask Mr.
4 Steinthal, when you do your cross, are you going to be
5 crossing from this, or are you going to be crossing
6 from your own documents? I'm just trying to figure
7 out whether we should give these back to Mr. --

8 MR. STEINTHAL: I didn't know there was a
9 "this" here until this morning.

10 ARBITRATOR GULIN: Right.

11 MR. STEINTHAL: And I suppose for
12 convenience, instead of delivering extra copies around
13 I could try to use the "this." But I'm not sure
14 that's, in the end of the game, going to make it that
15 much easier, given sometimes how hard it is to find.

16 CHAIRMAN VAN LOON: I would interject. I
17 think you should use whatever you had planned in
18 advance and not worry about this.

19 MR. STEINTHAL: Okay.

20 ARBITRATOR VON KANN: But maybe we should
21 put these back as opposed to returning it to you, just
22 in case over lunch he thinks of something he wants to

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1 ask in here. So maybe we should hold them in reserve
2 until we see --

3 MR. STEINTHAL: Well, why don't -- you can
4 hold them.

5 ARBITRATOR VON KANN: Yes.

6 MR. STEINTHAL: You know, and we'll see
7 what I want to do.

8 ARBITRATOR VON KANN: If you ask a
9 question, and he has to go back to the paralegals and
10 get them all out of boxes again, and so on, that's a
11 waste of time.

12 PARTICIPANT: Know when to hold them, know
13 when to fold them.

14 (Laughter.)

15 MR. STEINTHAL: Mr. Joseph reminds me that
16 given the fact that I'm going to be moving certain
17 documents into evidence, I'll probably use the
18 separate documents that we've -- we've already copied.
19 We already --

20 CHAIRMAN VAN LOON: I think that would be
21 easier, and it'll be a smaller volume.

22 MR. STEINTHAL: Right. That's for sure.

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1 CHAIRMAN VAN LOON: I'm not sure we need
2 all 10 drafts.

3 MR. GARRETT: Judge von Kann, I should
4 also note that there was a renewal of this agreement,
5 and so some of the documents, particularly in the
6 later volumes, concern the renewal. We're going to
7 discuss the renewal in the point of time that it
8 occurred. So we'll come back to this set --

9 ARBITRATOR VON KANN: Okay.

10 MR. GARRETT: -- but that's why -- that's
11 what's included in some of the other materials.

12 ARBITRATOR VON KANN: Okay.

13 BY MR. GARRETT:

14 Q At this point, I'd like to just focus on
15 the final agreement, which I think we've noted is
16 included -- or was included in the direct case as
17 060 DR. And I want to -- Mr. Marks, could you just
18 walk us through that agreement and explain exactly the
19 key terms of that --

20 A Sure.

21 Q -- of that agreement.

22 A There are two agreements, just to -- oh,

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1 no, the second one is the renewal I guess. There are
2 two. There's a performance and an ephemeral. So --

3 Q And they're both included at 060 DR,
4 correct?

5 A Yes, correct. Okay. You know, the
6 beginning is just some preambles. I think the first
7 important thing to focus on was the definition -- or
8 is the definition of gross revenues. And that's at
9 the bottom of the first page over to the middle of the
10 second page, and you can see it's fleshed out in great
11 -- much greater detail than it was on the -- on the
12 term sheets.

13 Q Incidentally, Mr. Marks, there is a
14 definition of gross revenues that's contained in the
15 Copyright Office regulations dealing with the
16 subscription services rate, correct?

17 A Yes.

18 Q Can you tell us how this definition would
19 compare to that definition, just in very general
20 terms?

21 A I haven't looked back at that one in a
22 while, but we certainly used that as part of the basis

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1 in drafting this.

2 Q And then you made modifications in that
3 definition?

4 A Yes, to account for the difference in the
5 business models and the types of revenues that may be
6 accruing here as opposed to for those services.

7 Q Okay. And the definition here is
8 contained in Section 1.2?

9 A 1.2, right, subsections A through G. And
10 it's a pretty expansive definition. It's meant to
11 cover all revenues that come into the site, and we've
12 -- including fair market value for services or barter,
13 which was something that was occurring a lot on the
14 internet, where there may be some barter in terms of
15 advertising or things like that that were exchanged
16 between people and business.

17 And the first -- 1.2A would cover any
18 subscription-like payment, if there were any. Now,
19 they didn't have that in their business model at the
20 time. But if they were charging to access the website
21 in any way, or getting some payments from an internet
22 service provider as a result of people coming to the

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1 website, that would be covered.

2 Subsection B covered advertising. I think
3 the one thing to note here is that in this agreement
4 we had an agency commission deduction of 15 percent.
5 We later changed that -- in fact, it may have been in
6 the very next gross revenues deal that we did -- to 30
7 percent to allow for a much heftier deduction.

8 And we did that because on the internet
9 the ad agency deductions were much higher, at least
10 initially, than they were in some traditional markets.
11 And we wanted to recognize that fact and not put --
12 not treat them like somebody who was in a different
13 medium, and, therefore, give them the benefit of that.
14 That wasn't something that happened until after this
15 agreement, but we --

16 CHAIRMAN VAN LOON: When you say "ad
17 agency deductions," could you just elaborate a little
18 bit on that?

19 THE WITNESS: Sure. So if a webcaster
20 engages a third party agency to sell advertising for
21 them, instead of having their own sale -- excuse me?

22 CHAIRMAN VAN LOON: It's the net back to

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1 the webcaster minus the ad agency's commission.

2 THE WITNESS: Right. Right. In some
3 instances, they may be paying more than that, but we
4 were giving them up to a certain amount. It had to be
5 a third party site. If they were getting less than
6 that, then -- it wasn't as if they got a flat 15. It
7 was actually incurred, so that -- that is in
8 Section B.

9 C --

10 BY MR. GARRETT:

11 Q Before you get off to that, just explain
12 a little bit about how that works. You often talked
13 here in terms of percentage rates. But it is true, is
14 it not, that the base against which that rate applies
15 is very important, correct?

16 A Absolutely. So the 15 percent is not
17 really 15 percent because there are deductions that --
18 and just setting the MMM agreement aside for the time
19 being, looking at our traditional agreement, that's 15
20 percent that has the 30 percent deduction.

21 Assuming that there is a 30 percent
22 deduction that's actually incurred by the webcaster

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1 and is taken off, you're dropped to 10-1/2 percent.
2 So that is important to understand, because if you
3 look at the 15 number it's -- there's more to it than
4 just that. It -- you've got to look at what it
5 applies against.

6 ARBITRATOR VON KANN: So does this mean
7 that if an advertiser agreed to pay MMM \$100 for an
8 ad, but they had to remit \$20 to the ad agency as a
9 commission, you're going to consider the revenue from
10 that \$85?

11 THE WITNESS: In MMM's case, that's right.
12 In later cases, it -- they would have gotten the full
13 80, and if it had been more it might have been up to
14 70.

15 ARBITRATOR VON KANN: Okay.

16 THE WITNESS: Okay? Provision C -- yes,
17 C is the provision of time and space, such as -- and
18 really getting at sponsorships there.

19 D is if they were charging for their
20 software to use the site. So, for example, if MMM
21 were charging users to download their player, to
22 access their site, we thought that that -- that was a

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1 potential business model that some people were talking
2 about at that time. We wanted to capture a percentage
3 of that.

4 E is references or inclusion of products
5 or services, which is similar to advertising and
6 sponsorship.

7 F is net sales of any products. This
8 covers e-commerce, with two important qualifications.
9 One is that it doesn't apply to the sales of sound
10 recordings. So to the extent that they were making
11 money off of selling sound recordings, either
12 themselves or getting bounties or affiliate fees from
13 a third party who was doing that, those would not be
14 included.

15 BY MR. GARRETT:

16 Q Is that an issue that you had negotiated
17 with MMM?

18 A Absolutely. Absolutely. He raised that
19 with us. We had some internal discussions about it.
20 We thought there were arguments that could be made for
21 why you might want to cover if the affiliate fees or
22 the bounties -- in the end, we -- we compromised on

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1 that and have done so throughout all of our deals.

2 The second issue is -- and this was
3 another thing that MMM raised -- is that it be on the
4 net sales products and not the gross sales of
5 products. So that they weren't paying more in
6 royalties than they were actually getting in terms of
7 -- and we had some negotiations over how you calculate
8 that, how to deduct applicable sales taxes, shipping
9 costs, but not other costs.

10 I mean, there was some time spent with --
11 with MMM on that issue. And then bad debts is the
12 last part. So that's the gross revenue definition,
13 which I think is the first thing.

14 The minimum performance amount, which is
15 1.4, you can see that we essentially gave them that
16 \$30,000 introductory rate for the first 14 months.
17 It's expressed here as 60 percent off of the annual
18 fee of \$75,000, but that -- that's equivalent to
19 \$30,000.

20 1.5 has the definition of operating
21 expenses, so that that metric can be calculated when
22 you're doing the 15 percent, the greater of the

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1 expenses or the revenues. That's the definition of
2 operating expenses. And, again, that was something
3 that we spent some time with MMM over and including
4 and excluding certain things.

5 On page 3, just a couple of things to
6 point out. Section 1.8, at the top, this was
7 obviously limited to the territory. And this raises
8 an issue that I don't know whether it has been
9 discussed here or not, but it's probably worth taking
10 30 seconds on.

11 Webcasters -- just the internet as a
12 global medium -- webcasters generally make
13 performances beyond the U.S. and are, therefore,
14 making performances that, setting aside the issue of
15 whether they're cognizable as a performance in the
16 U.S., certainly are in the country of reception.

17 And we have been asked by a number of
18 webcasters, what are we supposed to do about this?
19 How do we -- we're paying you for this, but what about
20 all of those other things?

21 And we have spent a considerable amount of
22 time -- me personally -- over the past two plus years

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1 in working with not only the record companies but
2 other licensing societies abroad to set up an
3 international schematic for -- that will end up being
4 essentially a reciprocal agreement between us and
5 other licensing societies or copyright owners
6 directly. So that we can extend our license and give
7 them the ability to pay without having to go to every
8 separate copyright owner abroad.

9 So that -- it's something we've taken on
10 ourselves, and it's -- it's been rather expensive,
11 just to get the whole thing set up. But just seeing
12 "territory" reminded me of that.

13 In 2.4 --

14 ARBITRATOR VON KANN: Can I just ask --

15 THE WITNESS: Sure.

16 ARBITRATOR VON KANN: I'd have to go back
17 and look, but are the proposed -- RIAA's proposed
18 rates, the ones you're proposing to us at this point,
19 only with respect to performances that occur within
20 the United States?

21 THE WITNESS: Yes. And that's how --
22 that's what our agreements are. We have not done any

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1 agreements that license anything beyond that, so --

2 ARBITRATOR VON KANN: So if there's -- if
3 some service has some listeners in France who come on
4 and play -- or some other country -- that's not
5 covered by the royalty that we're going to be setting.

6 THE WITNESS: That's correct.

7 ARBITRATOR VON KANN: At least under your
8 proposal. I guess that's true of the webcasters also.

9 THE WITNESS: I don't believe it could be
10 covered, because the rate here is to cover
11 performances in the U.S. To the extent there are
12 performances that are made abroad and that would fall
13 under the copyright law of another country, that would
14 be a different -- something that would have to be set
15 by that --

16 ARBITRATOR VON KANN: Is it your
17 understanding that the -- that it is fairly easy for
18 the webcasters and broadcasters to determine that in
19 the course of making their reports to you? Does it --
20 is it easily determinable through the software that
21 they've got that some portion of these listeners are
22 outside the U.S.? You know, we've got somebody up in

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1 Canada who is listening, and he's across the border.

2 THE WITNESS: I'll tell you the two things
3 I know about that. One is that there is technology
4 available that allows you to do what's called
5 essentially a reverse IP lookup, where you're looking
6 at the IP address to find out where it actually --
7 where you're actually sending it, and, therefore, can
8 determine at least the IP address, which is the
9 address that every computer on the internet has, where
10 that performance is going.

11 Now, the problem with that is that the IP
12 address is not always accurate because you may be
13 sending a performance to a certain computer that then
14 sends it out to everybody on their network. AOL is an
15 example of that.

16 I'm not the best person to get into the
17 technology, but there is technology -- my
18 understanding is that -- at least what I've heard is
19 that it -- and this is from some of our members who
20 are more well versed in it -- that it's about 80
21 percent accurate.

22 Now, the other thing I know about it is

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1 that I'm told that Microsoft is very close to having
2 something on the market or in final -- it's in final
3 development to allow for that kind of geographical not
4 only identification but limitation. So there are some
5 things out there that can give at least pretty
6 accurate information, although not down to the exact
7 performance.

8 BY MR. GARRETT:

9 Q On that subject, are you familiar with the
10 -- well, let me ask you this. Do you know whether or
11 not the Section 114 authorizes a statutory license for
12 performances outside the United States?

13 A No, it does not.

14 Q Okay. Are you familiar with the
15 litigation between the NFL and Primetime 24 dealing
16 with the extraterritorial effects of Section 119 of
17 the Copyright Act?

18 A Only in very general terms.

19 Q Are you aware of the Second Circuit's
20 decision in that case, generally?

21 A Yes. I'm --

22 MR. STEINTHAL: This is beyond the scope

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1 of the direct.

2 MR. GARRETT: It certainly is. But it's
3 responsive to something that Judge von Kann had --

4 ARBITRATOR VON KANN: I don't want to get
5 us into a major detour. I just hadn't focused on this
6 before and wanted to make sure everybody -- there was
7 a pretty easy way of counting performances in the U.S.
8 It sounds like there sort of is. So I guess that's
9 about as far as I wanted to go with it at this point.

10 THE WITNESS: Yes. And I think the other
11 important point is just that there is a separate way
12 to pay for those. We're doing what we can to
13 facilitate that.

14 ARBITRATOR VON KANN: Okay.

15 THE WITNESS: Back to page 3. Section 2.4
16 talks about -- this is the syndication issue, where we
17 had a provision inserted in the agreement that said,
18 "Nothing herein authorizes MMM to enter into any
19 arrangements for accessing their programming through
20 another website." And that got to the co-branding
21 issue.

22 Just focusing now on page 4, 3.1 is

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1 payment terms, greater of 15 percent of revenues or
2 operating expenses, subject to the minimum fees.
3 There are some payment provisions -- for example, when
4 the payment has to be made within 20 days, etcetera.

5 And also, if there are late payments, or
6 if there are not -- if there isn't a fee report that
7 they can send at the time the payment is due, that
8 they sent a payment that's 20 percent higher than the
9 previous month, and then it's reconciled later once
10 the report comes in.

11 I mean, I realize some of these are
12 mundane, but they were things that -- that we not only
13 had to draft but discuss with every party.

14 Getting down to 3.5, there is this -- the
15 provision for the public service announcements for the
16 industry. There is a limitation that it be no more
17 than one at any given time.

18 In 3.6, we had a provision where they
19 linked to copyright owners. This is something that we
20 eventually dropped, because we realized that -- and
21 this was something that we were able to negotiate and
22 get in with MMM, but it was an objection -- an issue

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1 they raised and was raised further with others.

2 By requiring this, we were essentially
3 driving people away from the site. And the webcasters
4 basically said to us, "Hey, look, we're willing to pay
5 you a fair royalty. We're willing to do things like
6 public service announcements that -- where people are
7 still at our site. But where you're requiring us to
8 make links to another site, where somebody can click
9 on it, we may lose that person." And so that was in
10 this initial agreement but fell out of future
11 agreements.

12 3.7 is just a buy button. 3.8 is survey
13 and other reports. And 3.9, four, is the term. Five
14 and six have various reporting and other issues.
15 Seven is the confidentiality issue where the acts --
16 the confidential information as defined, which
17 included the reports, including the financial reports
18 and usage reports, would only be released to those on
19 a need-to-know basis.

20 And this was something that MMM wanted
21 specifically -- that they not be released to people
22 who are also employees of individual record companies.

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1 In other words, we could -- we could pass along the
2 information to do what needed to be done with the
3 information, but not give it to record companies, who
4 they might want to sell the information to separately
5 -- and auditors if -- in the event there was an
6 arbitration proceeding.

7 Eight and nine and 10 are -- I don't think
8 require any specific discussion. They're pretty
9 standard, things that you would find in standard
10 licensing contracts.

11 And then there are exhibits attached, at
12 least the reporting exhibit. And then there's an
13 ephemeral license agreement that had the two percent
14 of revenues or operating expenses, and many of the
15 other same provisions. Okay?

16 BY MR. GARRETT:

17 Q Anything further you want to say about
18 MMM?

19 A I think that capsulizes it.

20 Q Okay. Why don't we --

21 ARBITRATOR VON KANN: Can I ask you one
22 question about the very first page, which says that

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1 this agreement made between RIAA as the representative
2 of sound recording copyright owners, and any assignee
3 or designee thereof.

4 THE WITNESS: Right.

5 ARBITRATOR VON KANN: And it doesn't
6 identify them anywhere in here that I could see. We
7 know that you are speaking for the five major labels,
8 and some number of other independents, I guess, had
9 joined the committee. How does this -- were there
10 some independents who said, "Thank you very much.
11 I'll do my own deal"? And are they outside of the
12 scope of this agreement?

13 THE WITNESS: That's a good question.
14 Generally, there is an exhibit to the agreement. It's
15 now Exhibit A to all of our agreements, and it's about
16 that thick. I don't know, about an inch thick or so,
17 that lists all of the copyright owners that are --
18 that we represent and that have given us the authority
19 to enter into this agreement on behalf of -- I,
20 frankly, don't know why that's not attached right here
21 to this agreement, but it is something that's
22 attached, and it includes all of the labels of those

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1 majors, as well as many, many, many other independent
2 labels.

3 It obviously does not include 100 percent
4 of the universe of sound recordings in the U.S. We're
5 hoping that some day it will. We have a membership
6 director of Sound Exchange now, whose job is to go out
7 and sign people up. We have -- a lot of people just
8 aren't aware that we're out there doing this. And
9 we're in the nineties in terms of percentage of market
10 that we cover, but we're not at 100 percent yet.

11 ARBITRATOR VON KANN: Did that list -- did
12 Exhibit A grow as it were -- as you went along? More
13 and more people joined the -- jumped on the bandwagon
14 as it were?

15 THE WITNESS: Yes. Definitely. We -- we
16 update that monthly and --

17 ARBITRATOR VON KANN: And would people --
18 in a case of an agreement like this, some independent
19 who wasn't on board as of April '99, could they
20 subsequently join and bring themselves under the scope
21 of this agreement?

22 THE WITNESS: That's how we've handled it.

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1 ARBITRATOR VON KANN: Okay.

2 MR. GARRETT: Judge von Kann, just for the
3 record, a copy of that list is included as
4 Exhibit 7 DR. It was sponsored by Ms. Rosen.

5 ARBITRATOR VON KANN: What number?

6 MR. GARRETT: 7 DR. And, as Mr. Marks
7 said, there would be variations of that exhibit. It
8 would have changed over time, but the version that was
9 current, as of the time that we submitted the direct
10 testimony, is at 7 DR.

11 We did include it here. It's a very thick
12 list and often times the differences, at least for
13 purposes of these agreements, is fairly minor.

14 ARBITRATOR VON KANN: Okay. Thank you.

15 MR. GARRETT: Okay. I was going to move
16 to the second licensee, which is Lomasoft for
17 Cablemusic.

18 CHAIRMAN VAN LOON: It looks like there's
19 several volumes related to this. Perhaps we ought to
20 just show some flexibility and break three and a half
21 minutes early and --

22 (Laughter.)

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1 -- start with Lomasoft after lunch, at
2 1:30.

3 (Whereupon, at 12:24 p.m., the
4 proceedings in the foregoing matter went
5 off the record for a lunch break.)

6 CHAIRMAN VAN LOON: Well, Mr. Garrett, the
7 Panel was making some calculations over lunch. Since
8 we've done one of the 26 arrangements, we're
9 approximately --

10 MR. GARRETT: We are intent on getting to
11 our 90 hours, Your Honor.

12 (Laughter.)

13 CHAIRMAN VAN LOON: Please proceed.

14 MR. GARRETT: I think they'll go a little
15 faster.

16 BY MR. GARRETT:

17 Q Mr. Marks, at the break you were going to
18 describe your second licensee, which was Lomasoft?

19 A Yes. Lomasoft is a company that launched
20 their webcasting service called Cablemusic.com.
21 Lomasoft is a technology company. In fact, the way we
22 met or first contacted, or first spoke I should say,

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1 with Lomasoft was that they were a member of SDMI,
2 which is -- I don't know whether it has came up -- it
3 has come up yet but Secured Digital Music Initiative,
4 which was a multi-industry platform for discussions
5 about securing music in the digital age.

6 And we -- RIAA launched that, along with
7 several other technology companies. And Lomasoft was
8 a participant. And James Gambale, who was the head of
9 Lomasoft, approached me at an SDMI meeting to say that
10 they were interested in starting a webcasting service,
11 in fact had plans to start a webcasting service in a
12 couple of months.

13 And we had a brief discussion whereby I
14 told them, "Here's where we're at in terms of" --
15 because we were, at that point, in the middle of the
16 six-month negotiating period, and that we could either
17 be in negotiations or he could file his notice and
18 wait for the arbitration.

19 Cablemusic, just a couple of words on
20 them. They launched sometime in early to mid '99 and
21 have been up ever since, a little over two years.
22 They have -- they rank fairly highly on the Arbitron

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1 and Measure Cast services. They have a number five
2 ranking for March and have a bunch of their stations
3 in the top 50, and are also featured on Microsoft
4 Windows media radio guide. And --

5 ARBITRATOR VON KANN: March of this year?

6 THE WITNESS: Yes. March of this year
7 they were number five, and then had --

8 ARBITRATOR VON KANN: Number of listeners?

9 THE WITNESS: In -- I guess Arbitron goes
10 by total listening hours, so they would -- they were
11 in that. And they had one channel that was third in
12 Measure Cast's ratings, and eight other channels in
13 the top 50. So they've achieved a fairly loyal
14 following, obviously, since the time that they
15 launched.

16 I pulled out a couple of the slides.

17 BY MR. GARRETT:

18 Q Incidentally, just -- the different screen
19 shots are all in Exhibit 128 DP, is that right?

20 A Yes, that's correct.

21 So the ones I have here are 18 and 19, and
22 they show what the site looks like and what the player

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1 looks like as they are -- you know, as they're
2 launched by the user. So --

3 Q And you also have some information about
4 them on page 23 of your written testimony? 23 to 24?

5 A Yes. Let me get that out, too. I think
6 we have some basic information about the number of
7 employees, offer over 20 channels. They had revenues
8 of \$275,000. I believe that was last year, for 2000.
9 And they have five people.

10 They don't have in-house sales staff, so
11 they rely on advertising agencies to do their sales
12 for them.

13 So my first contact with them was in early
14 1999, February/March area. I think I actually met
15 with Mr. Gambale in late April 1999 at an SDMI meeting
16 in New York.

17 And let me just thumb through a couple of
18 these. He sent me a followup e-mail that's Bates
19 8488, saying that they had --

20 Q What was the date on that e-mail?

21 A I'm sorry. May 4th of '99. So this about
22 a week after, 10 days after the meeting we had -- I

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1 had with him -- saying that he had seen the press
2 release regarding musicmusicmusic and had decided that
3 they'd like to move forward with the statutory
4 licensing process.

5 So, at the meeting I had with him in April
6 in New York, it was very basic about what we were
7 doing. A lot of the things that we have on the FAQ on
8 our website, what the various options are, etcetera.
9 And then he got back to us about 10 days later saying,
10 "We'd like to move forward with talking with you about
11 doing an individual license." And we embarked upon
12 that process.

13 CHAIRMAN VAN LOON: Did he bring up any of
14 the -- you testified earlier about the sort of -- the
15 different disincentives that webcasters had to enter
16 in. And I'm curious whether he raised any of those,
17 or said, "I know we could just wait and not pay
18 anything for two years," any of that. Was there any
19 discussion?

20 THE WITNESS: I honestly cannot recall
21 whether he, in particular, raised that at that time.
22 We made that very clear to everybody that we talked

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1 with. It was on our FAQ. You can see from this
2 e-mail the conversation we had was essentially, "Here
3 are the options," and then he's getting back to me
4 saying, "Yes, we'd like to move forward with this
5 option."

6 And I think that there are other e-mails
7 in later agreements that you'll see where there was
8 more specific references to -- to the arbitration
9 where webcasters would say -- with whom we were
10 negotiating would say, "If you don't accept this,
11 we're just going to go to the arbitration." Or we
12 know we have that option, and how that played out in
13 the negotiations.

14 But I know it was an issue at some point
15 in our discussions with Lomasoft, but I can't tell you
16 exactly what was said at what time.

17 I think that the next thing that happened
18 was we had some discussions about the type of service
19 that they had plans for, and we had various phone
20 calls later in May about that, and they had described
21 to us, "This is what we're thinking of," etcetera, and
22 we began to talk about the kinds of -- the kinds of

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1 licenses that we had in mind at that point, and how we
2 were going to pursue licenses. And, again, that was
3 mainly around the -- the gross revenues agreement.

4 So we had a discussion with him that I
5 think the -- let's see. Bates Number 8513 is a --

6 BY MR. GARRETT:

7 Q What's the date on that?

8 A That's -- well, the date on the top is
9 July 2nd, but it attaches a June 15th e-mail that I
10 sent to him, which I'm not -- I don't know whether
11 that's earlier or not. But if we just focus on the
12 bottom half of that. I was forwarding to him a term
13 sheet.

14 CHAIRMAN VAN LOON: 8513?

15 THE WITNESS: Yes. 8513. It's -- the top
16 of it would be James Gambale to me on 7/2/99.

17 CHAIRMAN VAN LOON: Mine jumps from 8500
18 to 8514, 8515.

19 MR. STEINTHAL: It's two pages before
20 8500, Your Honor.

21 CHAIRMAN VAN LOON: Oh.

22 MR. STEINTHAL: That's what he's talking

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1 about.

2 ARBITRATOR VON KANN: These numbers, you
3 know, are not in order, because they put -- the
4 documents were apparently Bates stamped at one point,
5 and then in putting stuff in chronological order, the
6 Bates stamping is out of sequence. So it's a little
7 bit of a -- we have to work at it a little bit.

8 THE WITNESS: So that page contains -- the
9 e-mail at the bottom was from me to him, attaching a
10 term sheet for Cablemusic, and this was based on the
11 discussions that we had had with him late May or early
12 June. And you can see that the term sheet that's
13 attached, which is Bates 8499, talks about the greater
14 of a 15 percent of gross revenues or some minimum fee,
15 and that was to be based on further discussion with
16 them.

17 And then, number 3 had the buy button, the
18 copyright owner links, which were -- were still
19 something we were asking for at that time, and then
20 various information, such as data and surveys in the
21 third bullet under three.

22 And then, number 4 contained the basics of

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1 the reporting requirements regarding the sound
2 recording usage, and 5 -- 5, we were asking for the
3 number of performances, even though at this stage we
4 were still talking about a percentage of revenues.
5 And then it attached, at 8500, our definition of gross
6 revenues, which is similar to the definition that we
7 discussed earlier today.

8 And then they sent back to us, on
9 July 27th, so after a few weeks --

10 MR. STEINTHAL: Might I interpose this?
11 I saw this previously. There are two documents that
12 are identical right in the binder, bearing different
13 dates. And maybe the witness can help us as to which
14 date is -- one is -- because you have July 27th, and
15 then three pages later July 6th. And it appears to be
16 the identical document.

17 THE WITNESS: Yes, you're right. I think
18 that they dated this incorrectly. I think the date
19 was supposed to be June 27th. Well, no, could that
20 have been? Because we sent it to them on the 2nd?
21 It's their document dated the 27th I'm trying to --

22 MR. STEINTHAL: It literally is, you know,

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1 line by line the same document, except one's got July
2 27th and one's got July 6th. So --

3 BY MR. GARRETT:

4 Q Do you know why it was dated that way?

5 A No, I don't actually. I thought it might
6 have been because it was June, but that couldn't have
7 been because we sent the -- the correspondence before
8 that is July 2nd. I have attached -- actually, it may
9 have been, because the July 2nd e-mail on 8513 says,
10 "I have attached a letter detailing our response," so
11 that could have been written a few days earlier on
12 June 27th as opposed to July 27th.

13 I don't know why there's another one in
14 here that's July 6th. I think the letters -- they
15 look identical. It may have been that they just sent
16 them to us separately for some reason.

17 Q Mr. Marks, if you don't know, you don't
18 know.

19 A Yes, I -- I don't know.

20 Q Let me just ask you if the July -- if
21 either one of those -- let's look at Bates stamp
22 page N8514. Do you have that?

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1 A Yes.

2 Q Dated July 27, 2001.

3 A Yes.

4 Q And the second paragraph --

5 A Yes.

6 Q -- second line, says, "Contrary to some
7 other of our competitors, it is our hope that we can
8 forge a strong, profitable, and equitable relationship
9 with the RIAA that can continue through the next
10 millennium without conflict, legal or otherwise." Do
11 you know what that was a reference to?

12 A Yes, I -- he was referencing the decision
13 to sit down and try and negotiate a license as opposed
14 to arbitrating.

15 Q After these documents were exchanged there
16 in July of '99, what happened?

17 A I think what happened next was that
18 because we were far off on the gross revenue model, at
19 least initially here, whereas they had proposed a rate
20 of five percent with some deletions of various parts
21 of our definition, we moved to try and discuss another
22 way to do a license agreement.

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1 So we started talking about a per
2 performance agreement. And the per performance
3 agreement was something that we had been developing
4 for several months, as a result of our discussions
5 with DiMA. Our discussions with DiMA really centered
6 around how to structure an agreement, and we talked a
7 little bit with them on gross revenues.

8 And then we were beginning to try and
9 think of other ways to do a deal, and had internally
10 begun to think of the possibility of a per performance
11 agreement and discussed that with our members. So we
12 had been discussing that and had some comfort with
13 trying the per performance option when the discussions
14 with Lomasoft rolled around here in early July. So --

15 Q Mr. Marks, why were you looking at per
16 performance as an option?

17 A Well, we were trying to be flexible in the
18 discussions to -- to get deals done. We weren't tied
19 to the gross revenue option. We thought that if -- at
20 the right rate -- there were pluses and minuses to
21 each, the gross revenues and the per performance, but
22 we thought that if the licensee thought that that was

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1 a preferable way to proceed that was fine with us. We
2 could proceed in that manner. So we proposed that as
3 a possibility to Lomasoft.

4 Q All right. Well, just briefly, what were
5 the pluses and minuses concerning a percentage of
6 revenue deal?

7 A Well, the percentage of revenues approach,
8 as I said earlier, is something that the industry had
9 a lot of experience with in terms of doing licensing
10 deals over many, many years, at least the members of
11 our negotiating committee and our record company
12 members.

13 So we were very comfortable moving forward
14 with that, and there was some feeling that because our
15 product is so unique, or I should say their product is
16 so unique, that it's not inappropriate to be, in
17 essence, a partner in somebody's business. You know,
18 it's not like providing a service or providing widgets
19 to somebody where you can get the same widgets from
20 somebody else.

21 The recordings in -- there's only one
22 Beatles record, or only one Beatles version of Abbey

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1 Road or -- or any song, and every act is the same way.
2 So it was something that the industry had experience
3 with and was conditioned with and made a lot of sense
4 for webcasters as well.

5 The problems that we encountered were I
6 think twofold. One was getting the base of the
7 revenues right, and the related issue to that was,
8 when you had websites -- and we were increasingly
9 seeing this around the summer of 1999, where you had
10 webcasters that were not just about the music or about
11 the DMCA-compliant music, but about a lot of other
12 things, it made it difficult to try and isolate and
13 allocate which revenues were attributable to the music
14 and what was fair for us to receive as a royalty.

15 And that was difficult because our -- you
16 might have, for example, a website that has five
17 different parts to it, only one of which is music.
18 You may have 80 percent of the people going to that
19 site because the music is there, and only 20 percent
20 going because of the other things that are on the
21 site.

22 And our feeling at the time was that we

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1 couldn't just look at the advertising that -- revenues
2 that were being derived off of the exact page or the
3 player that had the music. There were people visiting
4 the site. There was a home page with advertising.
5 There were a lot of additional revenues that the
6 webcaster might be receiving that were related to the
7 use of the music.

8 And as I said, it's easy to do a gross
9 revenues deal when the site is all about the music.
10 But when there's other things it becomes much more
11 difficult to figure out. So that's the down side of
12 the gross revenue model.

13 Q All right. And on the per performance,
14 what were the pros and cons as you saw it?

15 A The per performance -- the pros and cons
16 were the following. The pro of it was that we viewed
17 it as a possible vehicle for us to get additional
18 deals done. People were interested in it at the time.
19 It was something that the internet was uniquely suited
20 to deal with in the sense that you could track
21 performances, whereas for other uses of music it's
22 very difficult to track actual performances.

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1 And by "performances," we meant per song
2 per person. So if 10 people listened to a song that
3 was being played, there were 10 performances. Very
4 difficult to do that for over-the-air radio, for
5 example. You don't have that connection with the end
6 user to know, okay, this person is listening from this
7 time to this time, and, therefore, listening to these
8 songs.

9 So it -- the technology -- the medium
10 itself allowed us to put something together, a metric
11 like that.

12 The down side was that, for the same
13 reason that our members liked the gross revenues
14 option, the per performance option made them feel like
15 their music was a commodity. It wasn't -- you lost
16 the flavor of it being unique and getting a percentage
17 of the revenues that were being derived by the
18 webcaster as a result of people listening to that
19 music.

20 You had to actually set a fee. You know,
21 it's like pricing widgets. How much does this song
22 cost? And, you know, that was something initially

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1 that there was -- there was some -- you know, a lot of
2 thought about, but eventually, obviously, they became
3 comfortable enough with that metric and we moved
4 forward with it.

5 Q All right. So you had discussions, then,
6 with Lomasoft here about a potential per performance
7 rate, correct?

8 A Correct.

9 Q And you actually made some proposals to
10 them on a per performance deal, correct?

11 A Yes. I think that we -- on July 9th, we
12 sent them a draft agreement. And this is -- the
13 e-mail attaching the agreement is at 8521.

14 Q It's about two pages past the ones we were
15 talking about?

16 A Yes, this -- that's correct, yes. And
17 that was a draft agreement, and we had had discussions
18 in between the last term sheet and this where we had
19 talked about, okay, let's try a per performance
20 agreement, and that seemed to work for Lomasoft.

21 And I think that the way that this was
22 done you can see that -- yes, actually, what we did in

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1 this agreement, it was a combination of revenues and
2 per performance. And this went to the heart of what
3 I was just discussing before about the difficulty and
4 there being a site where a number of people were going
5 for something other than music, and that was what
6 Lomasoft had expressed some hesitation about.

7 We had a basic agreement that if most of
8 the people who are coming to our site are coming for
9 the music, we'll pay you a percentage of our revenues.
10 If, on the other hand, they're coming for something
11 else, we want to pay you on a usage basis as opposed
12 to paying you a percentage.

13 So what we did was we had a combination
14 agreement where it was 15 percent of revenues, with a
15 12 percent introductory rate. And this is on page 5
16 of the agreement, in Section 3.1. The Bates is 8526.

17 Q This is the draft agreement.

18 A This is the draft agreement sent on
19 July 9th. So, in 3.1, you can see it was a 15 percent
20 rate, with a 12 percent introductory rate for the
21 first year, provided that if less than a third of the
22 revenues that were being derived were from pages where

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1 performances of music are -- in other words, if only
2 a third of the traffic and revenues was really related
3 to the music, then it would -- the per performance
4 rate would kick in as the metric for payment.

5 And if you'd flip back to page 2 of the
6 agreement, at Bates 8523, Section 1.7 is the
7 definition of payable performance rate. And we had a
8 scale sliding upward from .3 to .75 cents, based on
9 the number of performances.

10 And so that -- that was the agreement that
11 we sent to them for -- based on the discussions that
12 we had had.

13 Q I take it that the per performance rates
14 that you proposed were not acceptable to them, is that
15 right?

16 A No. I -- I think what happened was they
17 initially did some calculations where it came out far,
18 far above the percentage of revenues based on their
19 models, and then they realized they had made a
20 calculation error and it was -- it was closer. But
21 they decided that they wanted to switch back to a
22 straight gross revenue proposal.

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1 Q All right. And then in -- later that
2 month of July, you made a proposal to them based on a
3 percentage of revenues?

4 A Right. We sent --

5 Q Let me just direct your attention to an
6 e-mail dated July 23rd, 1999, with the Bates stamp
7 number N8568.

8 A Yes. That shows -- well, yes, let me
9 explain this. In between the -- sending the draft
10 agreement about the per performance and this e-mail,
11 when we switched back to the gross revenue, there was
12 -- we explained that we wanted to do a greater of
13 revenues or expenses, similar to how we had approached
14 the deal and signed the deal with MMM.

15 I remember Mr. Gambale saying, "Is there
16 some other metric that we can figure out, instead of
17 a percentage of our expenses, that basically we need
18 as much cash as possible on hand to -- in order to
19 build our business. We're happy to have you share in
20 that business as it grows, so that there's up side for
21 you. But instead of paying you a percentage of our
22 expenses at a time where we need as much cash as

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1 possible, where we're building our business, is there
2 some other metric?" And --

3 MR. STEINTHAL: Can I interpose an
4 objection? Again, this is a woefully difficult
5 situation, where we have Mr. Marks testifying about
6 what a company representative allegedly said to him.
7 It's clearly hearsay as to the truth of the matter
8 asserted.

9 One of our problems with their model from
10 day one has been the notion that these deals reflect
11 what a willing buyer would do, and it has applied to
12 everyone in the world. And, frankly, I'm not even
13 sure how to deal with the issue.

14 I mean, it's -- if it's being offered for
15 how RIAA reacted, for its state of mind I suppose in
16 making a proposal, I suppose I can -- I can live with
17 that, but certainly not for the truth of the matter
18 asserted by any of these buyers.

19 I really want to make a very specific
20 objection to Mr. Marks testifying about what motivated
21 any particular company, where they haven't brought
22 that company representative in here to tell you what

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1 motivated them to do something. I think the only way
2 this gets in is for the limited purpose of how RIAA
3 reacted to something, and as a basis for a proposal
4 that RIAA made.

5 But I want to be very clear that it can't
6 come in for the truth of the matter of what a
7 supposedly willing buyer said or -- said to Mr. Marks.

8 CHAIRMAN VAN LOON: But we had some
9 discussion of that before lunch, and I thought that
10 the Panel made some indications that we were really
11 thinking of it in terms of the dynamics of what was
12 said in the negotiation, which may be bluffing, it may
13 be -- it's not -- not asserted or not looked at for
14 the underlying truth, but, rather, what partners in
15 the negotiation were saying or hearing from each
16 other. But that was sort of our inclination.

17 MR. GARRETT: I have no problem in
18 limiting it in that way, and I assume the same rules
19 will apply to the testimony they adduced, such as Mr.
20 Moore's discussion of what it was that Scott Purcell
21 told him as to why he entered into the deals. I
22 wouldn't want a double standard to be applied in that

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1 regard.

2 But I am perfectly happy to go through the
3 remainder of the direct exam and just have Mr. Marks
4 focus upon what it is that he offered and what's
5 contained in the e-mails.

6 MR. STEINTHAL: I don't think that
7 objection was raised at the time by Mr. Garrett, and
8 I do think that there may be other bases for admitting
9 the testimony of Mr. Moore on those issues. And we
10 can talk about that at some other time rather than
11 tying up Mr. Marks' time here.

12 But, certainly, I'm interested in the
13 specifics of Mr. Marks' testimony at the time he is
14 making it, because of concerns I have about the issue
15 that I raised. So --

16 ARBITRATOR VON KANN: I take it that what
17 you are in effect doing is a continuing objection to
18 all of that testimony by Marks?

19 MR. STEINTHAL: Yes. I mean, it --

20 ARBITRATOR VON KANN: The things said by
21 the people on the other side of --

22 MR. STEINTHAL: Right.

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1 ARBITRATOR GULIN: Now, is this objection
2 specifically a hearsay objection, or is this more
3 towards the idea that this was not raised in the
4 direct testimony?

5 MR. STEINTHAL: Well, I think it's both.
6 But as to the latter, Your Honor, I think there's been
7 so much latitude in the fact that it's not been raised
8 in the direct that I wouldn't press that objection as
9 vigorously as the hearsay one, because, you know, the
10 -- we have raised the issue of the circumstances
11 surrounding the execution of these agreements in
12 arguing our position.

13 And just as I have begged the indulgence
14 of the Panel to have some latitude when similar types
15 of situations have arisen earlier in the case to allow
16 a witness to address something, I'm not going to sit
17 here and say that he can't address what his view of
18 the circumstances were surrounding the entering into
19 of an agreement.

20 I do, however, feel and have felt from day
21 one that if the RIAA was going to try to establish a
22 willing buyer/willing seller framework here, based on

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1 these agreements, they had some burden to bring in
2 those ostensibly willing buyers to demonstrate what
3 their true motivations were and not have the ability
4 to back door their case by having Mr. Marks testify
5 about what the motivations were.

6 He hints at motivations in his direct
7 testimony that -- written testimony that motivated
8 webcasters. And I had a real problem with that in the
9 sense that, you know, here is somebody with a keen
10 interest in the outcome talking about what somebody
11 said to him, clearly with the goal of having you take
12 at face value that the webcasters' motivations were X,
13 Y, and Z, who entered into these agreements.

14 And I don't think that he can testify
15 about the truth of what a webcaster's motivation was
16 because it is absolutely crystal clear hearsay. If he
17 wants to go into this to talk about why the RIAA made
18 a specific proposal, and the evidence is admitted
19 solely for the purpose of understanding why the RIAA
20 reacted or why the RIAA did something, and we've all
21 been through this in different contexts.

22 I can understand the limited purpose offer

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1 associated with that form of testimony, but it -- it
2 could be really prejudicial to have Mr. Marks,
3 especially given his interest in the outcome, be the
4 voice for hearsay statements by webcasters who entered
5 into these agreements.

6 MR. GARRETT: Well, before you -- just one
7 last point here. On this particular issue here, the
8 fact is that Mr. Marks did describe -- discuss it in
9 his written testimony on page 9. He talks about how
10 certain webcasters wanted a percentage of revenue
11 royalty but were hesitant to pay a percentage of their
12 expenses because they wanted to avoid further upfront
13 costs in the early stages of developing their
14 business.

15 In fact, he discussed generally the
16 factors that went into their offering a per
17 performance rate, and how it was a reaction to what it
18 was that was being told to them out there in the
19 marketplace. So I think it is, with respect to this
20 particular objection, clearly within the scope of his
21 direct testimony.

22 And I am not asking to offer this here for

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1 the truth that this is exactly what somebody from
2 Lomasoft truly believed, but that, you know, this is
3 what motivated the flexibility on the part of -- of
4 RIAA to offer the per performance rate, among other
5 things.

6 ARBITRATOR VON KANN: So you're content,
7 then, for this testimony to be received -- when he
8 refers to things that were said by the other parties
9 -- not for the truth thereof but simply as explaining
10 the course of conduct pursued by RIAA?

11 MR. GARRETT: Yes, I think that's --

12 ARBITRATOR VON KANN: It sounds like that
13 takes care of the issue.

14 ARBITRATOR GULIN: I don't want to get
15 caught up in semantics too much on this issue of the
16 truth of the matter asserted. If he -- if Mr. Marks
17 is saying that person X said that the reason they want
18 this provision is -- in an agreement is this, you're
19 saying that you're not offering it for the truth of
20 the fact that that's the reason why it was being
21 offered by the other party?

22 In other words, if the other party says,

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1 "I want -- I don't want a buy button," what is it
2 being offered for, if it's not to show that the other
3 person didn't want a buy button? Just to show that
4 there was a negotiation?

5 MR. GARRETT: Points to the issues that
6 were negotiated over and how it was that RIAA reacted
7 to the various positions, demands, offers, whatever,
8 that the other side made.

9 CHAIRMAN VAN LOON: "I don't want a buy
10 button" might have been a complete negotiation tactic
11 that he didn't care about. And we're just -- this is
12 just the dynamics of what people are saying back and
13 forth in the negotiation.

14 MR. GARRETT: And how it relates to the
15 ultimate agreement that came out of it. I mean,
16 again, our position was that these agreements spoke
17 for themselves on these issues. The issues that
18 they've raised are, what are the circumstances
19 surrounding the negotiation of those agreements? And
20 we're trying to address those circumstances here.

21 ARBITRATOR GULIN: All right. And you
22 made a statement about other hearsay that has been

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1 brought out at this proceeding, that you want that
2 treated in the same way, or is that something --

3 MR. GARRETT: Certainly. I mean, just as
4 an example, you know, Mr. -- I objected to all of Mr.
5 Moore's testimony but -- on that particular subject.
6 But for him to come in and say, "Well, you know, Scott
7 Purcell of WWW told me that the reason he entered into
8 this agreement was as follows," you know, if that's
9 being offered for the truth of the matter, then I
10 absolutely have a problem with that as well.

11 MR. STEINTHAL: I would simply like to be
12 able to address that at a different time, or now. But
13 because that objection was not raised at the time --
14 and I think there are different circumstances
15 surrounding that -- that's all.

16 CHAIRMAN VAN LOON: At least one member of
17 the Panel is going to suggest a different time.

18 (Laughter.)

19 (Whereupon, the proceedings in the
20 foregoing matter went off the record at
21 2:05 p.m. and went back on the record at
22 2:21 p.m.)

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1 CHAIRMAN VAN LOON: While we are sitting
2 here on Capital Hill of the Federal Government, and in
3 a Federal Building, and under the jurisdiction of the
4 Federal Library of Congress, the Federal Rules of
5 Evidence do not apply in this proceeding.

6 As all of you know, the CARP rules of
7 evidence provided at 251.48, that evidence that is not
8 unduly repetitious or cumulative, and is relevant and
9 material, shall be admissible. And in short, hearsay
10 is not excluded from these proceedings.

11 It has been admitted in other contexts
12 earlier in this CARP and in other CARPs, and we do not
13 propose to change horses in midstream. Having said
14 that, the panel is fully aware of the weight that
15 should appropriately be given to alleged statements
16 made in the course of negotiation, and in a context
17 when the person is not here to be cross-examined.

18 And we will certainly take that into
19 account, but this also obviates the need for us to go
20 back and revisit earlier rulings.

21 MR. GARRETT: Let me just note for the
22 record, Mr. Chairman, that if these hearings go on

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1 much longer, that most of these E-mails will qualify
2 as an exception to the hearsay rule as ancient
3 documents.

4 CHAIRMAN VAN LOON: Now we know your
5 strategy.

6 MR. STEINTHAL: It wouldn't apply to the
7 ones that were produced this weekend.

8 CHAIRMAN VAN LOON: Okay. So, let's
9 please proceed.

10 BY MR. GARRETT:

11 Q All right. Mr. Marks, we were talking
12 about your negotiations with Lomasoft and the fact
13 that you ultimately offered a percentage of the
14 capital option here. Would you just briefly explain
15 how that came to be?

16 A Yes. We had talked to them once they
17 wanted to switch back to the gross revenue option
18 about having the operating expense formula, and they
19 preferred to do something else. So, what we arrived
20 at after some discussion was having 15 percent of
21 gross revenues, but an additional payment of a small
22 percentage of money that was either invested in the

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1 company, or proceeds from a public offering, something
2 that we turned the capital amount in the actual
3 agreement.

4 So focusing back on this July 23rd E-mail
5 that I sent to Mr. Gambale, it was 15 percent of
6 revenues, and then one percent up to \$10 million, and
7 so that would be a hundred-thousand dollar payment if
8 they got an infusion of capital of \$10 million.

9 And 2 percent for \$50 million, and 3
10 percent for anything over \$50 million. And that is
11 where we ended up. We went that route and were able
12 to close the deal on that basis.

13 Q And the deal was finally closed when?

14 A August 10th of 1999.

15 Q And was Mr. Gambale represented by counsel
16 in these negotiations?

17 A Yes. He had an attorney who was copied on
18 most of the e-mails. I think he had different
19 attorneys at different times. Rick Nock is the
20 attorney that was representing him here, I think, and
21 I know at some point in time that he was also
22 represented by Cooley Gotward, but I don't know

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1 exactly what time that was.

2 Q Okay. Let's then turn to the actual
3 agreement, which is --

4 ARBITRATOR VON KANN: Two very quick
5 questions. You said that this started out because the
6 guy said I have seen your press release on
7 MusicMusicMusic. I take it that you put out a press
8 release that said something like we have signed our
9 first deal, and would everybody please take notice and
10 give us a call or something.

11 But you did not reveal the specific terms
12 of the deal with MusicMusicMusic?

13 THE WITNESS: That's right. We released
14 a press release with MusicMusicMusic at the time that
15 the deal was done. I had had discussions with Mr.
16 Gambale before that release. He did reference it when
17 he got back to us after those initial discussions,
18 saying that we are now ready to go.

19 I think that -- and I don't want to get
20 into what he was thinking in all of this, but in any
21 case, we did have this press release saying that we
22 have done this deal, et cetera, and it may be in these

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1 documents somewhere.

2 And, no, we didn't release -- we did not
3 want to negotiate in the press. We wanted to
4 negotiate in the marketplace with companies, whether
5 that be through -- with DiMA at the time that we were
6 doing the MMM deal, or whether it was the individual
7 companies that we ended up sitting down with after
8 that.

9 ARBITRATOR VON KANN: Another thing very
10 quickly. You said that your members were comfortable
11 with the concept of a percentage of revenue?

12 THE WITNESS: Yes.

13 ARBITRATOR VON KANN: And you may have
14 said this, and I apologize, but I am trying to figure
15 out where they got that comfort level. You don't have
16 that with over-the-air radio we know, and I don't
17 think that is the way the mechanical royalties work.

18 So where did this comfort level come from
19 with dealing with the percentage of revenue? Can you
20 give me some idea about that?

21 THE WITNESS: Yes, a couple of examples.
22 I know that with Background Music Services, those have

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1 traditionally been the way that those deals have been
2 structured. I believe also that licensing of -- for
3 sound tracks as well have been in those deals, or in
4 that structure. Those are the two that come to mine
5 quickly.

6 ARBITRATOR VON KANN: Okay.

7 BY MR. GARRETT:

8 Q So, compilation deals?

9 A Yes, compilation deals, right.

10 Q All right. Let's turn to the agreement
11 with Lomasoft, which is at 061DR. Could you just
12 quickly walk us through the key provisions of that
13 agreement?

14 A Sure. Okay. On the first page, I think
15 that the only thing to point out here is the first
16 definition in 1.1, of what capital amount is, and this
17 was something that required not only some thought, but
18 some time in the negotiations.

19 It basically covers cash or other
20 consideration that they received. It specifically
21 excluded things at that their request. For example,
22 of founder stock, and things like that.

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1 But any cash or other consideration that
2 they received by their stockholders, and specifically
3 would have covered things like an initial public
4 offering.

5 In Section 1.2, that merely captures what
6 we called the capital percentage, and captures the 1
7 percent for up to \$10 million, et cetera, that we had
8 agreed upon.

9 Q Mr. Marks, did you ever get any
10 compensation from Lomasoft pursuant to these capital
11 amount or capital percentage provisions?

12 A No, we have not.

13 Q And you are not in the rate proposal that
14 RA has made in this proceeding, there is no similar
15 capital amount option, correct?

16 A No, there isn't.

17 Q And why is that?

18 A Well, I think -- it was something that we
19 did in the context of this individual deal that seemed
20 appropriate at the time, and I am not sure --

21 ARBITRATOR VON KANN: It seemed like a
22 good idea at the time?

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1 THE WITNESS: Yeah. Right. We obviously
2 lost the benefit of this bargain in the sense that
3 there is a 12 month tail, and so it is possible that
4 if there is some money that is invested in the company
5 in the near future that we will still see some of it.

6 But we didn't think that it was an
7 appropriate means to have a statutory license on that
8 basis.

9 ARBITRATOR VON KANN: Okay.

10 BY MR. GARRETT:

11 Q Okay. Let me just refer you to Section
12 1.6, and there is a definition there of gross revenue.

13 A Right.

14 Q And that is similar to the definition that
15 was in the MMM agreement?

16 A Yes, except that you can see that we have
17 the 30 percent figure for the ad agency deduction, and
18 I think that the remainder of it is similar, except
19 for (e), which I think is a little bit different,
20 because Lomasoft was a technology company, and was
21 developing software for other purposes.

22 They have an agreement with a vendor, with

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1 Chase Bank, for example, and they wanted to make sure
2 that any software that they were providing as that
3 other part of the business was not included here.
4 So we had to draft some language specific for them on
5 that.

6 ARBITRATOR VON KANN: Under this ad
7 agency, did you as sort of a due diligence make any
8 effort to determine what kind of advertising revenue
9 was pouring into these outfits during this period of
10 time?

11 This is now the second one, and we are in
12 early-to-mid 1999, and did you -- I don't know -- ask
13 for financial statements, or some kind of proof of
14 what their advertising revenues were?

15 THE WITNESS: Yes. We not only asked for
16 revenue information and basic financial information to
17 date, but also often asked for projections, and
18 received projections, or had discussions at least
19 about what those projections were.

20 So we had a feel for what they were
21 expecting at least as the growth of their business.
22 And often times the minimum performance amount, the

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1 flat fee part of it at least, was pegged towards that
2 expectation.

3 It was said at something that if you are
4 going to make \$500,000 next year, then a minimum fee
5 that is a little less than 10 percent or something
6 wouldn't be inappropriate as a minimum fee. So you
7 end up with something around \$30,000. So we
8 definitely had those discussions.

9 ARBITRATOR VON KANN: And there was some
10 advertising revenue coming in, and they were
11 projecting healthy increases in that in this time
12 frame, in 1999?

13 THE WITNESS: Absolutely. I think -- I
14 can't tell you exactly how much they had at the time
15 in this instance, Cable Music, but they had some, and
16 they were projecting that they were going to have
17 more.

18 And I think that Cable Music paid us
19 somewhere in the range of \$40,000 over the course of
20 the agreements. They had a few hundred-thousand
21 dollars worth of revenue over the course of that year-
22 and-a-half.

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1 BY MR. GARRETT:

2 Q Let me just direct your attention then to
3 Section 3, Licensees and Other Consideration.

4 A Yes.

5 Q Now, in 3.1(a), there is the fee of 15
6 percent of gross revenues, right?

7 A Yes.

8 Q But there is also represented 12 percent
9 of gross revenues, right?

10 A Yes.

11 Q Could you tell us what that is?

12 A That was an introductory rate that we
13 offered to them as a compromise as part of the deal.
14 So they would pay in the first 12 months a 12 percent
15 rate, and then the 15 percent rate thereafter.

16 Q All right. And then in Section 3.1(b),
17 there is a reference there to the capital percentage
18 and capital amount, correct?

19 A Right. That is referring back to the
20 other provisions that we discussed, and giving an
21 example of what the payment would be based on a
22 certain amount of capital being infused.

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1 Q Okay.

2 A And then 3.1(c) has the tail that I
3 mentioned, the 12 month tail.

4 ARBITRATOR VON KANN: Mr. Marks, you
5 really need to keep your voice up. There are people
6 all the way in the back who want to hear.

7 THE WITNESS: All right. All right.

8 BY MR. GARRETT:

9 Q And just briefly could you describe what
10 is contained in Section 3.2 through 3.11?

11 A Well, 3.2 through 3.11 include initially
12 some of the reporting obligations, licensee reporting,
13 and interest payments for late fees, and then starting
14 at 3.6, there is the public service announcement
15 provision.

16 And at 3.7, there is the link to the
17 copyright owner provision, and 3.8, there is the link
18 to the Lay Buy button, linked to a place to buy the
19 records from, where the artist, album, title, and song
20 title information is.

21 And at 3.9 is the survey information, and
22 3.10 is the additional reports section, in addition to

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1 the surveys. And 3.11 is just something that we -- we
2 later dropped this, but regarding -- something
3 regarding the license limitations. And we ended up
4 dropping that, and it didn't seem really to fit in a
5 web test site.

6 Q Is there anything else that you wanted to
7 add about your negotiations and your deal with
8 Lomasoft?

9 A I think that the remaining provisions --
10 well, without looking, there are a number of red lines
11 that we didn't go over that were drafts that went back
12 and forth, where there were, I'm sure, some language
13 changes to some of these other provisions in Sections
14 5 through 10.

15 But without spending the time to go
16 through every one of those red lines, I would not be
17 able to pick any out. But the point is that everybody
18 that we talked to had different ideas about how
19 certain language should be.

20 And they wanted additional provisions or
21 guarantees on some of these, and we had to negotiate
22 each one of those in a lot of instances.

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1 Q Okay. Why don't we move to the third
2 deal, which was the one with RadioFreeWorld.

3 A RadioFreeWorld is --

4 MR. GARRETT: Well, hang on just one
5 second before we get into that.

6 ARBITRATOR VON KANN: While those are
7 being passed around, did you ever do what apparently
8 ASCAP and BMI did we were told, is to put a form of an
9 agreement out on the website, and say here is the
10 deal, and everybody wants it, and give me a call?

11 THE WITNESS: No, we didn't.

12 ARBITRATOR VON KANN: You did not do that?

13 THE WITNESS: No, we didn't.

14 ARBITRATOR VON KANN: And these were all
15 customized deals as it were?

16 THE WITNESS: To some extent. We thought
17 about that, but we wanted to -- well, we didn't want
18 to put out a form agreement because one of the things
19 that we thought that we had to do in these
20 negotiations, given the context of the statutory
21 license, and the disincentives that existed, was to
22 try and be flexible.

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1 And we wanted that flexibility -- well,
2 putting out a form agreement just seemed to send the
3 wrong message regarding that, and so we decided
4 against it.

5 BY MR. GARRETT:

6 Q Okay. RadioFreeWorld is discussed on page
7 24 of your written testimony, correct?

8 A Yes.

9 Q And you also had some screen shots from
10 RadioFreeWorld?

11 A Yes.

12 Q And that is at Exhibit 129DP, correct?

13 A Yes.

14 Q Why don't you tell us a little bit about
15 RadioFreeWorld?

16 A Well, it was launched in 1999. They are
17 a very small operation that is like an eclectic public
18 radio station. They have a lot of what is referred to
19 as world music.

20 And if you look at the screen shot on page
21 24, you can get that sense just from looking at that.
22 They have one channel of audio, and they don't use --

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1 a majority of their content, or at least my
2 understanding is, that a majority of their content is
3 not RIAA content.

4 They have other contents that may be
5 licensed by individual copyright owners, or artists,
6 individual artists, who fall within this sharna.

7 Q And RadioFreeWorld is operated by a single
8 individual; is that right?

9 A I am not sure that that is the case.
10 There is one primary person, but for example, in the
11 negotiating process, we dealt with more than one
12 person. So there is more than that to the
13 organization.

14 Q All right. Why don't you tell us a little
15 bit about the negotiating process with RadioFreeWorld?

16 A Well, it began in late July, and they
17 contacted us, and we sent them to -- I believe we sent
18 them to the FAQ on the site, as we did a lot of
19 people.

20 They said that they had filed their letter
21 of intents with the copyright office, and we had some
22 discussion with them over the phone with Joey

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1 Lattimer, who was the principal individual who ran the
2 site.

3 And since his site didn't contain a
4 majority of RIAA content or content of members that we
5 represented, we talked about doing a per performance,
6 and that seemed like the logical approach for that
7 kind of site, much in the same way that we had been
8 talking with CableMusic about if only a certain -- if
9 less than a third of their listeners were coming to
10 the music session, a section of the site, that it
11 would be a per performance.

12 And we had a couple of discussions over
13 the phone, and Mr. Lattimer brought in a financial
14 advisor, a Mr. Leonard Weissbach, who I had
15 discussions with, and send the draft agreements to.

16 And what we ended up doing, they wanted to
17 lower the minimum fee, and what we ended up doing --
18 and this is another twist -- was having a minimum fee
19 of \$10,000.

20 But if they had received investments in
21 the company of \$2 million or more, then it would
22 increase to \$50,000. So they didn't have to give us

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1 a percentage of their capital, but the minimum fee at
2 least was tied to the investments, and they were
3 speaking with investors and in the markets at that
4 time to receive capital.

5 ARBITRATOR VON KANN: What was the figure
6 again if investments were received?

7 THE WITNESS: Two million dollars, and it
8 was just that one figure. If it was \$2 million or
9 over, it was \$50,000. And that seemed to work for
10 them. These discussions were going on in September,
11 and --

12 BY MR. GARRETT:

13 Q September of 1999?

14 A September of 1999, yes, and we completed
15 the agreement in late September, September 22nd.

16 Q All right. Let's just go to the agreement
17 itself. The agreement itself is at 62DR, correct?

18 A Yes.

19 ARBITRATOR VON KANN: Are these folks
20 still in operation?

21 THE WITNESS: Yes.

22 BY MR. GARRETT:

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1 Q Okay. Could you tell us what this is?

2 A This was our first straight per
3 performance agreement, and as we have seen with some
4 of the others, we had been discussing per performance
5 with other companies. So we didn't draft this
6 specifically for RadioFreeWorld.

7 We had this form in place as a result of
8 other negotiations, and some of the differences from
9 the deals that we have spoken about so far include on
10 page one, Section 1.5, for example, that talks about
11 the definition of a payable performance.

12 And it says that in each instance in which
13 any portion of a sound recording is delivered via
14 website transmissions, which is a separately defined
15 term, except for those where there was a license
16 agreement that you had already with another copyright
17 owner.

18 Q Could you just give us a little bit of
19 explanation as to exactly how -- well, explain what
20 per performance means exactly.

21 A Per performance means somebody listens to
22 a song, and that counts as one performance. So if in

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1 an hour there were 15 songs played by RadioFreeWorld,
2 and 10 people were listening to all of those songs, or
3 any part of all of those songs, then there would be
4 150 payable performances.

5 And they would pay the payable performance
6 rate for each of those.

7 CHAIRMAN VAN LOON: Is that more precisely
8 that that number of computers were attuned to it?

9 THE WITNESS: Right.

10 CHAIRMAN VAN LOON: As opposed to the
11 number of people or the panelists that might be
12 sitting around listening? It would be three, but it
13 would be just one?

14 THE WITNESS: Well, we can't capture the
15 multiple people at a computer, but yes, to each
16 computer.

17 BY MR. GARRETT:

18 Q Let me ask you also, Mr. Marks, on the
19 agreement here with RadioFreeWorld, on page 2, Section
20 1.6, the first payable performance rate. Do you see
21 that?

22 A Yes.

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1 Q And the rate here was .4 cents, correct?

2 A Yes.

3 Q And it then has a proviso dealing with
4 performances and sound recordings of more than 5
5 minutes in duration. Do you see that?

6 A Yes.

7 Q Just explain what that is all about.

8 ARBITRATOR VON KANN: What paragraph? I'm
9 sorry.

10 THE WITNESS: This is 1.6, at the top of
11 page 2. What this meant was that the .4 cents
12 essentially paid for a song that was up to 5 minutes
13 in duration, but if you had a longer song, then you
14 would pay essentially 20 percent of the .4 cents for
15 every minute over 5 minutes.

16 And there is a direct analog to this in
17 the mechanical compulsory license, where record
18 companies pay music publishers that same amount. So
19 the compulsory license that record companies obtain
20 for the use of musical works under Section 115
21 includes -- it is called a long song rate, where you
22 are paying an additional fee if the song is longer

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1 than 5 minutes.

2 And the idea being that the average song
3 is usually about 3-1/2 or 4 minutes long, and so there
4 is some latitude. But if there is a 10 minute piece,
5 then the rate should be higher for something like that
6 than it should be for a song that is 3-1/2, or 3, or
7 4 to 5 minutes long. So that is where that is derived
8 from.

9 BY MR. GARRETT:

10 Q And this long song rate is actually set
11 forth in the Copyright Office's rules and regulations
12 implementing this Section 115, statutory licenses?

13 A Yes.

14 ARBITRATOR VON KANN: Remind me what this
15 Section 115, statutory licenses, refers to?

16 THE WITNESS: That is the compulsory
17 license for the reproduction and distribution of
18 musical works in a phono record, meaning like in a CD.
19 So the use of a payment that a record company, for
20 example, would make to the music publisher and song
21 writer for putting a song that they had written and
22 published on to a CD.

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1 ARBITRATOR VON KANN: So a mechanical
2 rate?

3 THE WITNESS: Yes, a mechanical rate.

4 BY MR. GARRETT:

5 Q And the long song rate that is currently
6 in those rules is one that has been negotiated between
7 the recording industry on the one hand, and the
8 publishing industry on the other hand; is that right?

9 A Yes.

10 Q Are there any other provisions in here
11 that you wanted to highlight?

12 A I don't think there is anything
13 additionally that is very different from the previous
14 agreements that we have already discussed.

15 ARBITRATOR GULIN: Mr. Marks, have any of
16 the three agreements that we have gone over so far,
17 did any of those services utilize a next button?

18 THE WITNESS: A skip button?

19 ARBITRATOR GULIN: A skip button.

20 THE WITNESS: I believe that
21 MusicMusicMusic may have either had one at some point,
22 or had one now. I don't know for sure, but it is

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1 something that I could check and get you an answer on.

2 ARBITRATOR GULIN: Okay. And the other
3 two?

4 THE WITNESS: I don't know about
5 RadioFreeWorld. I think the answer is no. And I am
6 just not sure about cable music.

7 ARBITRATOR GULIN: How about a rating
8 function?

9 THE WITNESS: No.

10 ARBITRATOR GULIN: None of the three?

11 THE WITNESS: No.

12 ARBITRATOR GULIN: Anything else that you
13 would consider to be a personal interactive feature?

14 THE WITNESS: No, I don't believe that any
15 of our licensees have a rating feature.

16 ARBITRATOR GULIN: Okay.

17 ARBITRATOR VON KANN: Was the fact that
18 you did have this agreement with RadioMoi, and they
19 may or may not have had a skip feature at the
20 beginning, does that suggest to you that that was not
21 in your view a disqualifying factor, and that caused
22 you a problem?

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1 THE WITNESS: We can only license what is
2 under the statutory license, and so whatever was
3 licensed at that time. Now, with all of our
4 licensees, as with everybody else in the market, there
5 are compliance issues that come up.

6 And you have to -- and that is a burden on
7 us to monitor sites, at both our licenses and others,
8 and we have come across from time to time things that
9 our licensees are doing that we do think is outside
10 the statutory license.

11 And our position on a skip button is that
12 limited skipping is permissible, but not unlimited
13 skipping, and not where the skipping is used to
14 violate the performance compliment.

15 So if the skip button is used by a site,
16 you have to count the actual time listened in
17 evaluating the performance compliment, as opposed to
18 the length of the song which was never listened to.

19 So if you have a 3 minute song, and
20 somebody only listens for 20 seconds, and they skip
21 after 20 seconds to the next song, you can't count the
22 entire 3 minutes when evaluating the performance

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1 compliment in our view.

2 You have to count the 20 seconds, because
3 that is what was actually listened to. Otherwise, the
4 skip button could be used to violate the performance
5 compliment by somebody just skipping ahead to the
6 songs by particular artists, or artists that they
7 wanted to hear.

8 ARBITRATOR GULIN: So long as the skip
9 button was used in the manner that you just described,
10 and didn't violate the song, the performance
11 compliment, then whether or not a service had a skip
12 button wouldn't have any effect on negotiating a rate?

13 THE WITNESS: Well, let me retreat a
14 little bit, because when we did the deals -- at the
15 time that we did the deals, it was not my
16 understanding that anybody, with the exception of
17 MusicMatch, where there was a specific provision about
18 the skip button, had a skip button.

19 And certainly at the beginning of the
20 process, our feeling was that skip buttons were
21 inappropriate. But it frankly is ambiguous in the
22 statute. I mean, it is just not one of those things

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1 that is crystal clear.

2 I think that during the time that some of
3 our licensees have been under an agreement with us,
4 there may have been some, like MusicMusicMusic, and
5 again I am not positive about this, and that had a
6 skip button.

7 The only time we have ever addressed it in
8 the context of a license was in the MusicMatch deal,
9 where we had a limitation of an average of six skips
10 per hour.

11 ARBITRATOR VON KANN: So at this point
12 after the agreements have already been negotiated, it
13 is no longer an issue of whether it would have an
14 affect on the rape, and now it is just an issue of
15 whether they are in compliance, that they remain in
16 compliance if they adopt a skip button?

17 THE WITNESS: I am not sure that I would
18 agree with that. I think that if -- this is a little
19 bit of a moving target, because as I said, the statute
20 in some circumstances was not all clear.

21 If we were sitting down with a company
22 that did not have a skip button, and our understanding

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1 was that they had no intention turn corporate a skip
2 button, we would be looking at that service, and the
3 rate that we were applying to that service, as
4 applicable to just preprogram channels without that
5 kind of functionality.

6 If on the other hand we were sitting down
7 with somebody like we were with Music Match, we would
8 be looking at that in terms of how it would affect the
9 rate, and we can discuss another music match later
10 deal, a deal later, and how effective it is.

11 But I would not say that a skip button has
12 no additional value. I think it is an additional
13 feature and an additional functionality, and may
14 therefore have some additional value.

15 ARBITRATOR VON KANN: Did you put in any
16 of these agreements language such as, that it will be
17 a violation of this agreement to have stole a skip
18 position.

19 THE WITNESS: We didn't, and it is very
20 difficult to -- well, we weren't thinking in terms of
21 listing all the things that were excluded, because we
22 were looking at this as it only includes what is in

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1 the statutory license.

2 And the skip button was something that
3 when we started this process that frankly we probably
4 felt stronger about, in terms of it not being in the
5 statutory license, that we do now.

6 It is an ambiguous area, and we from the
7 beginning have not sought to aggressively enforce
8 every single compliance issue that came up. And in
9 some instances, we have tried to work through those
10 issues.

11 And I think that the skip button is the
12 perfect example of that, and that is what we did with
13 Music Match.

14 ARBITRATOR VON KANN: And I think you said
15 on the other hand that any kind of a waiting feature
16 you would have regarded as not being consistent with
17 the statutory license?

18 THE WITNESS: Rating features that
19 influence play with individual users, we would
20 undoubtedly think are outside the statutory license,
21 and that is the subject of pending litigation with
22 Launch and MTV right now.

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1 And the main feature at issue in those
2 litigations is their use of rating features either for
3 artists, songs, or albums, and we feel strongly that
4 that is something that falls outside the statutory
5 license.

6 And that is something that I think we have
7 made very clear up front, and if that issue ever came
8 up with any of our licensees or others, we would have
9 notified that that was not something that was within
10 the statutory license.

11 The MusicMusicMusic field is a little --
12 there is an example there. They have this "I'm the
13 DJ" feature that they wanted to start, and they came
14 to us as part of the negotiations, and saying that we
15 are going to start this feature, and what do you all
16 think of that.

17 And that was something that we thought was
18 clearly personalized. It was picking songs and
19 putting them into a play list that was randomized back
20 to you.

21 But you were actually selecting the
22 recordings, and it was therefore in our view a

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1 personalized service. And there wasn't any issue with
2 them about. They just instituted that with only
3 content that they had a separate license for.

4 BY MR. GARRETT:

5 Q And on this subject, Mr. Marks, let go
6 back to the agreement here, which is the one with
7 RadioFreeWorld, 62DP. And let's go to Section 2.1 on
8 Page 2. And the grant of license. Do you see that?

9 A Yes.

10 Q What is the effect of this particular
11 provision here?

12 A This specifies the grant of license when
13 you are granting on behalf of our sound recording
14 copyright on our members to the licensee, which is for
15 transmissions that are made in accordance with the
16 statutory license.

17 And it specifies the sections that cover
18 the statutory license, Sections 114.D2, and A, and C
19 of Title 17.

20 Q And so you are granting them the rights to
21 do whatever is authorized, thereby the statutory
22 license; is that correct?

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1 A Yes. We only had one thing to offer in
2 these negotiations, and that was whatever was in the
3 statutory license paperwork. That was it.

4 Q There is also a reference there to 17
5 U.S.C. Section 1101. Can you tell us what that is?

6 A That is the bootlegging provision
7 regarding planing playing bootlegs and that is
8 generally an artist's right, although sometimes that
9 sound recording copyright and owner's right as well,
10 and if there is an actual recording of it, and we
11 wanted them to comply with that section as well.

12 Q What exactly does that section provide?

13 A It prohibits the use of bootleg recordings
14 without the permission of the artist, or if there is
15 the actual tape or a recording of it, whatever
16 copyright rights might exist on those as well.

17 Q Okay. And your fourth agreement was with
18 NRJ Media, is that right?

19 A Yes.

20 CHAIRMAN VAN LOON: Again, you are right
21 at a normal break time, and so why don't we take 10
22 minutes and come back.

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1 (Whereupon, at 2:58 p.m., the hearing was
2 recessed and went back on the record at 3:12 p.m.)

3 CHAIRMAN VAN LOON: Mr. Garrett, the panel
4 is conscious of the passage of time, and we were
5 reflecting that with three down and 23 to go, if we
6 spent 3 minutes on each one of the next ones, we would
7 probably be at 4:30 already, and with 6 minutes, at
8 5:30 or so.

9 We would find it particularly useful to
10 have pointed out elements of particular negotiations
11 that were different or special, or if there are
12 provisions in an agreement that is different from what
13 we have seen.

14 But we also -- and particularly for the
15 documents that are in evidence, we have mechanisms to
16 call those to our attention, and we are conscious of
17 the hour.

18 BY MR. GARRETT:

19 Q All right. Mr. Marks, with respect to
20 your fourth year, that was with NRJ Media, correct?

21 A Correct.

22 Q And they operated on a service known or

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1 called iJockey; is that correct?

2 A Right. It has yet to launch.

3 Q Okay. And having heard what the Chairman
4 just said, could you just highlight the portions of
5 your negotiations with NRJ Media here in about a
6 minute or two?

7 A Sure. As I said, they are a company that
8 is planning to off-launch a fully interactive and non-
9 interactive service. So, they were dealing with us
10 initially on the non-interactive piece, while at the
11 same time they were becoming to talk with individual
12 copyright owners on the interactive part.

13 And they are waiting to launch all at
14 once, and they have been raising money, and it was
15 probably reported that they raised some money last
16 year, a million point two, and are in negotiations
17 with companies.

18 When we started talking with them in late
19 June of '99, or sometime in June of '99, and we talked
20 about doing something that was a little bit different
21 with them. It was a per performance deal that was
22 bounded by a percentage of gross revenues.

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1 So it was a combination deal, but it was
2 bounded a few percent below 15, and a little bit above
3 15. So that the two were tied together and it didn't
4 fall below, or went above that percentage.

5 And we sent drafts to them in June, and in
6 July, you can see on the per performance rates that we
7 had actually had some discussions very specifically
8 about the rates. I am looking for the rates that were
9 in the initial deal.

10 It was .5 cents, and they basically
11 thought that that was too high, and specifically
12 because they were going to be obtaining or talking to
13 companies about getting interactive licenses, and
14 therefore they were very cognizant about paying a rate
15 that they thought that their business could be
16 successful on for the non-interactive portion, knowing
17 that they were going to be paying something more, or
18 at least believing that they were going to be paying
19 something more for the interactive portion.

20 So we had discussions going back and forth
21 on that, and then we ended up with a per performance
22 model, whereby it scaled upwards from .2 to .5, and

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1 the rate kind of in the middle was about .35, and it
2 was all based on the number of performances.

3 And there were various issues that arose.
4 For example, caps as a percentage of revenues, and
5 intro rates, and caps as a flat dollar amount.
6 Individually, I have worked with Mr. Hadded, and that
7 is H-A-D-D-E-D, and he wanted a cap of \$300,000 for
8 the term of the license, for example, and we went back
9 and forth on that.

10 And we told him why we couldn't accept a
11 flat dollar cap, because we thought that if you used
12 the music that you should pay for it. There was no
13 real reason that we could think of to have an absolute
14 cap.

15 And eventually we move forward with this
16 model of a per performance agreement that went from .2
17 cents up to .5 cents, but there were a number of other
18 things that he was able to negotiate, which included
19 getting 5 percent of all performances for free, and
20 performances of 10 seconds or less for free.

21 And those two things were -- in our minds,
22 we tied them to the fact that many times, especially

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1 back in 1999, the reliability of the streaming
2 technology was not great, in the sense that somebody
3 might start listening and get knocked off.

4 And he was concerned about paying for
5 somebody twice, in essence, where they go on and they
6 get knocked off, and then they come right back to
7 listen to the same song.

8 So we ended up -- that was something that
9 we hadn't done previously obviously, but needed to in
10 order to get this deal done.

11 Q There were a number of different draft
12 agreements then; is that correct?

13 A Right. Many, many drafts.

14 Q And were they represented by counsel?

15 A Yes, they had counsel, and there were very
16 detailed markups with riders, and not only the rate
17 language, but the license language, warranty, and
18 indemnification language, and these all appear about
19 a third of the way through.

20 And those went back and forth for I would
21 say a good two months on various issues like that.

22 Q And a final agreement was negotiated or

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1 was executed when?

2 A A final agreement was executed in early
3 October. I think October 5th, 1999.

4 Q And when is it that you first said you had
5 discussions with them concerning the agreement?

6 A In June. So it was about a four month
7 process.

8 Q Okay. And the agreement itself is
9 contained at 063DR, correct?

10 A Yes.

11 MR. GARRETT: And I would refer you to the
12 fifth agreement, which is with Jam Radio.

13 ARBITRATOR VON KANN: We have probably
14 advanced global warming by two degrees.

15 BY MR. GARRETT:

16 Q Could you tell us a little bit about Jam
17 Radio?

18 A Jam Radio offered music from late 1999,
19 sometime in the fall, I believe, until early-to-mid
20 2000, and they had 18 channels of music. They are
21 planning to relaunch this fall.

22 Apparently what happened with them was

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1 that there was a dispute with their ISP provider, who
2 took their entire music database, and I don't know the
3 merits of the dispute between them, but in the process
4 of this, they lost all of their content.

5 And therefore have been in a legal battle,
6 I guess, with them, and are now in a position where
7 they believe that they will be launching soon. And we
8 first started talking with them in -- well, the first
9 contact I had with them was in December of 1998, when
10 we sent a copy of the FAQ on our website to them.

11 And then we had further contact in August
12 of 1999, and I had a number of discussions with
13 Michael Meth. He was the primary person -- M-E-T-H --
14 that I dealt with. Michael is an attorney in New
15 York.

16 And he and I began negotiations sometime
17 in August of 1999, and we at that time had just
18 finished the Cablemusic agreement, and Mr. Meth -- we
19 initially sent him a grader of gross revenues or
20 operating expenses.

21 He had some similar problems with the
22 operating expense formula, and therefore, we went to

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1 a capital amount option again, as we had with
2 Cablemusic, and that worked for him.

3 And there were a number of redlines that
4 went back and forth during September, revised
5 agreements with taking out the operating expense, and
6 various other comments. And then we -- let me see --

7 Q Why don't we just turn to 064DR, and that
8 is a copy of your agreement with Jam Radio, correct?

9 A Okay. Yes.

10 Q And if we go to the rate section, is that
11 on page 4, 3.1(a), correct?

12 A Yes. So, on 3.1(a), it shows 15 percent
13 of revenues, with a 12 percent introductory rate,
14 similar to Cablemusic. And so --

15 Q And just so we are clear again, you gave
16 them a 12 percent rate until June 30th of 2000?

17 A Right. So it was about the first eight
18 months.

19 Q And then after that, they went up to the
20 15 percent of gross revenue, correct?

21 A Yes.

22 Q And there is also a capital percentage

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1 amount there, too?

2 A Right. And the numbers are a little bit
3 different for them, because we felt that they were not
4 as far along, and therefore presented a greater risk
5 for us, in terms of us receiving actual dollars as
6 Cablemusic was. So the percentages were a little bit
7 greater, and the amounts were a little bit less.

8 Q And you also had a minimum fee here in
9 Section 1.8, correct?

10 A Yes. It was an annual fee of \$10,000, but
11 we gave them a reduction for the first year, without
12 the first year, to \$2,500, a 75 percent discount.

13 Q Okay. Were there any other things to
14 highlight about the Jam Radio deal?

15 A Wait a minute. Let me go quickly through
16 it.

17 (Brief Pause.)

18 THE WITNESS: I don't believe so.

19 BY MR. GARRETT:

20 Q Okay. The next deal then was with Visual
21 Dynamics; is that right?

22 A Yes. Visual dynamics had 12 channels of

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1 music up for a period of time, and later went out of
2 business. We began discussions with them in late
3 September of 1999, and sent them a draft contract
4 based on some phone conversations that we had with
5 them.

6 And then got a letter back from them on
7 October 8th, and they had some concerns about how
8 others in the market were reacting. For example, they
9 pointed out that Net Radio nowhere in their S-1 had
10 they talked about doing an agreement with us.

11 And they understood that they were relying
12 on the statutory license fee, but they thought that
13 this hampered them in terms of being competitive in
14 the market. And there were some further discussions
15 about the rates and the deal.

16 Q All right. And they are no longer in
17 business; is that right?

18 A No.

19 Q All right. Why don't we move to the next
20 one, which was with OnAir, or WWW.

21 A Okay.

22 Q Now, you describe OnAir on page 25 of your

1 written statement, correct?

2 A Yes.

3 Q And we also have some screen shots at
4 132DP, correct?

5 A Yes.

6 Q Tell us just a little bit about OnAir?

7 A OnAir, which was formerly WWW.com, had 231
8 channels, and were for some time the largest
9 syndication service that existed on the internet.
10 They had syndicated over 70,000 sites, and by sometime
11 in 2000.

12 And they were started by an individual
13 named Scott Purcell, who had been very successful in
14 some businesses on the Internet, who turned his
15 attention to this, and raised a significant amount of
16 funding -- about \$26 million -- and we first had
17 contact -- I think this is one of only 2 or 3 of our
18 licensees that we actually contacted them.

19 And I did that in, I guess, about August
20 or so of 1999. I believe it was August.

21 Q And why did you contact them?

22 A Well, we became aware of them as one of

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1 the larger sites and they seemed to be growing rather
2 quickly, and we reached out to them to see if they
3 would be interested in discussions.

4 And they flew out to Washington with his -
5 -- with two people from WWW, along with their outside
6 counsel, and we had a meeting in Washington to discuss
7 a possible license deal, and that was sometime in
8 September.

9 ARBITRATOR VON KANN: So this was one of
10 only three where you initiated the contact?

11 THE WITNESS: I think it is two. I think
12 Yahoo was the only other one, but there may be one
13 other one that I am forgetting, but it is in that
14 range. It was just 2 or 3 where we made the first
15 contact.

16 ARBITRATOR VON KANN: So, if you didn't
17 get a call from Webcaster, that's it. You didn't
18 reach out to any of them; is that correct?

19 THE WITNESS: If you put it that way, I
20 feel like I didn't do much work. No, we had made
21 contacts -- you know, back in -- and just to rewind a
22 little bit, at the time that DiMA told us in June of

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1 1999 that we would have to speak with their members
2 individually, we were focusing primarily on let's go
3 to the big ones, and see if we can get deals done with
4 them to build momentum toward an industry-wide deal.

5 So in June of 1999, we contacted Yahoo,
6 AOL, and MTV, and had discussions, which we can talk
7 about later, with all of those. But we were being
8 contacted by a number of companies as well. So, it
9 was just that our focus was on those for a lot of the
10 reasons that have been discussed already.

11 BY MR. GARRETT:

12 Q You never sent out sort of a general
13 mailing or a notice saying DMCA has been passed, and
14 there is this statutory license, and we are here and
15 ready to sit down and talk to any of you?

16 A We didn't do that. We just didn't.

17 ARBITRATOR VON KANN: Did you mean DiMA or
18 DMCA had been passed?

19 MR. GARRETT: DMCA.

20 THE WITNESS: And just to follow up, when
21 the DMCA was passed, we didn't do that because we
22 thought we were sitting down with DiMA to do an

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1 industry-wide solution. So I guess we could have done
2 that after the DiMA negotiations fell apart, but we
3 didn't.

4 BY MR. GARRETT:

5 Q Now, in your discussions with OnAir, at
6 one point you discussed a per performance rate with a
7 cap of revenues or operating costs; is that right?

8 A Yes, I believe in September that we sent
9 them an agreement that had -- give me a second here.
10 It had a per performance rate of .35 cents, with a cap
11 of 15 percent of revenues or expenses.

12 So if you flip it around, you could look
13 at it as a 15 percent deal with a per performance
14 minimum in some respects. It depends on how you look
15 at it.

16 Now, eventually, they decided against that
17 approach and wanted just a straight per performance
18 agreement, and that occurred sometime later, I
19 believe, in -- maybe in October.

20 I think there is a red line in here at
21 Bates 11528 that you can see was our attempt before we
22 made this switch.

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1 Q Bates 11528?

2 A Yes, 11528.

3 Q And that's September 28th, 1999?

4 A Yes, September 28th, 1999. So before we
5 switched to the per performance alone, we were still
6 struggling with the gross revenues definition, and we
7 tried to come up with what was called here the
8 applicable percentage to figure out what the base of
9 the revenue should be.

10 And we did that by coming up with a number
11 of music sessions, as opposed to total website
12 sessions. It was just another attempt at trying to
13 get at the revenue model in light of the fact that
14 many businesses were moving beyond just offering the
15 music.

16 So, as I said, we eventually just moved
17 toward a per performance model. We gave a 5 percent
18 free goods so to speak, or free performances, in the
19 first year. And we proceeded along those lines for
20 the next couple of months, and eventually toward the
21 agreement.

22 Q And the agreement itself is set forth at

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1 066DR, correct, the final unit?

2 A Yes.

3 Q So your discussions and negotiations with
4 them went from September of '99 to when the agreement
5 was executed, which was in January of 2000, correct?

6 A That's correct.

7 Q And OnAir is no longer in business; is
8 that right?

9 A That's correct. They were acquired
10 sometime in early 2001.

11 Q Do you know who they were acquired by?

12 A Loudeye acquired part of the company, and
13 I believe that RadioAmp acquired another part of the
14 company. There are some additional issues in the
15 agreement that began to appear, and I am not sure if
16 they were in the previous ones or not.

17 But technology issues -- for example, on
18 page 5, regarding multicasting, I don't know whether
19 multicasting has been discussed in this proceeding
20 yet, but it was proposed at the time -- and I think it
21 is still a relevant, but less relevant, technology
22 today.

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1 But webcasting is done in what is called
2 a unicast environment, where it is a one-to-one
3 transmission. There were technologies being developed
4 whereby you could send a transmission to one place,
5 and it would sprout out, kind of like limbs off of a
6 branch, to individual users.

7 And we were concerned that in a per
8 performance agreement that we didn't get paid just for
9 that first -- just to the branch. We wanted to get
10 paid to the limb, where it reached all of the end-
11 users. So we had to include provisions relating to
12 that technological development that is in 4.5, for
13 example, of the agreement.

14 Q And the eighth agreement was with
15 eNashville, correct?

16 A Yes.

17 Q And that service is not launched, correct?

18 A Well, I thought they might have launched
19 for a short period of time, but I am not positive about
20 that. It is possible that they did not launch the
21 webcasting service. They may have launched the site,
22 but not started service.

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1 Q I take it that the negotiations with
2 Enashville were generally over the telephone; is that
3 correct?

4 MR. STEINTHAL: I didn't hear that.

5 BY MR. GARRETT:

6 Q I asked him whether the negotiations with
7 Enashville were generally over the phone?

8 A Hold on a second. It says Enashville, but
9 they are SpacialAudio. Give me a second here, too.

10 (Brief Pause.)

11 BY MR. GARRETT:

12 Q The question was whether the negotiations
13 with them were generally done over the telephone.

14 A Yes.

15 ARBITRATOR VON KANN: Mr. Garrett, I
16 couldn't hear that. I'm sorry, but could you repeat
17 that?

18 BY MR. GARRETT:

19 Q Were the negotiations with Enashville
20 generally over the telephone?

21 A Yes.

22 Q And the agreement itself is in 67DR,

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1 correct?

2 A Yes. It is a straight, per performance,
3 \$5,000 minimum .4 rate.

4 Q Are there any other special issues that
5 were raised by Enashville?

6 A Not that I can recall.

7 Q All right. The next one was with
8 GaliMusica?

9 A Yes.

10 Q Just describe what the GaliMusica site was
11 intended to be?

12 A GaliMusica is a site that -- it is a
13 company that has not launched their site yet. It is
14 a business that has their hands in a multitude of
15 different technology related businesses, and
16 webcasting is one of them.

17 And I believe that they are planning to
18 launch in the fall of this year, but had not launched
19 yet. And they contacted us in April of 2000 -- no,
20 I'm sorry, in February of 2000 -- after seeing the
21 press release on WWW.

22 And we had some discussions, a couple of

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1 draft agreements back and forth, and some specific
2 issues raised, and reached an agreement with them in
3 fairly short order.

4 Q And that agreement is contained at 068DR,
5 correct?

6 A Yes.

7 Q And just to go to the rate revisions of
8 that one, and --

9 A Well, before we do that, I wanted to point
10 out just one thing. This was the first agreement
11 where we offered somebody a license beyond 2000, I
12 believe. So, they wanted a license that went through
13 2002, and we agreed to that. Okay. I am at Section
14 3?

15 Q Right. Actually, look at Section 1.6 on
16 page one, and just describe what the rate is in that
17 agreement?

18 A Yes. That sets forth different rates for
19 each year of the agreement. So it starts out at .35,
20 and increases to .4 for 2001, and .45 for 2002.

21 ARBITRATOR VON KANN: Mr. Garrett, I
22 didn't now if you were planning to do this at some

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1 point, but I think Mr. Marks is saying that this is
2 the first agreement which went beyond 2000, which
3 pauses me to think.

4 We have already had some evidence about
5 other agreements with sites that I understand are
6 still operating. So if their agreements didn't go
7 beyond 2000, their agreements have presumably expired,
8 unless they have been extended in some way.

9 Were you going to talk at some point about
10 -- maybe later in the chronology, about extending
11 agreements or something?

12 MR. GARRETT: Yes. I thought I had
13 mentioned one or two of those. For example, MMM was
14 renewed here, I think, within the last week, and when
15 Mr. Steinthal talks about the documents that he just
16 got, those were the documents.

17 ARBITRATOR VON KANN: You just get to it,
18 and that's fine.

19 BY MR. GARRETT:

20 Q Is there anything else that you wanted to
21 highlight about GaliMusica?

22 A I don't think so.

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1 Q All right. The next one was with Spacial
2 Audio Solutions?

3 A Yes.

4 Q Please describe what Spacial Audio
5 Solutions was?

6 A Spacial Audio is a network, not unlike
7 Live365.com, where they aggregate the broadcasts of
8 individual companies or individuals. And they are
9 also a technology company, and offer a broadcasting
10 technology known as SAM. It is called Screaming Audio
11 Manager.

12 So, for example, on Live365, a lot of
13 webcasts on that site are through the Shoutcast
14 technology, and Spacial Audio had developed their own
15 technology, and were offering it to individual
16 webcasters.

17 And they had 153 stations, I think. It is
18 around 150 stations that they have now, I think, and
19 my testimony is that I am not sure the 150 is there,
20 but 120 stations it says in my testimony, but I think
21 they have a little bit more now.

22 Q When did Spacial Audio contact you or did

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1 they contact you?

2 A Yes. I spoke with them initially back in
3 December of 1999. It may have even been November of
4 1999, and we started exchanging draft agreements in
5 early December of 1999.

6 And we started out with a gross revenue
7 approach, and that's also where we eventually ended
8 up, but there were a few twists in the road, in the
9 sense that we went back and forth, I believe, to a per
10 performance agreement in the middle of that.

11 Q Okay. And let's just turn to the actual
12 agreement here, which is 70DR, or 69DR, excuse me.
13 What rates did you finally end up with Spacial Audio?

14 ARBITRATOR VON KANN: It was in Lubbock,
15 Texas, I believe.

16 THE WITNESS: Yes. It was 15 percent --
17 the greater of 15 percent of gross revenues and
18 operating -- well, before operating expenses, but we
19 gave them a 10 percent introductory rate.

20 BY MR. GARRETT:

21 Q Now, is there anything else that you would
22 like to highlight with respect to Spacial Audio?

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1 ARBITRATOR VON KANN: Can you just stop
2 there. You had several instances where you had a 12
3 percent introductory. Here is somebody that gets a 10
4 percent introductory. Now, why? Why the difference?

5 THE WITNESS: Well, it is what we had to
6 do to close deal. I mean, that's -- we had to make
7 the decision on whether it was worth dropping from 12
8 to 10 for an introductory period, and we made the
9 decision in this instance that it was worth doing, and
10 so we did it. It was just one part of a deal point in
11 this particular negotiation.

12 ARBITRATOR VON KANN: And had the
13 committee approved that?

14 THE WITNESS: Yes, absolutely. I think
15 that we would have had more trouble if the rate at the
16 end were different, if the rate at the end was 15
17 percent.

18 So, one thing that we tried to remain
19 cognizant of was not disadvantaging particular
20 companies, vis-a-vis others, and this was a slight
21 difference.

22 There may be other things in this

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1 agreement that Spacial Audio agreed to that some of
2 the others that had the 12 percent didn't agree to.
3 You can't just look at the rate. There is some other
4 trade-offs. I can't articulate those right this
5 second though, but there very well may be.

6 ARBITRATOR GULIN: These folks are still
7 in operation?

8 THE WITNESS: Yes.

9 BY MR. GARRETT:

10 Q And your next deal was with Multicast?

11 A Yes.

12 Q Now, Multicast is still in operation?

13 A Yes.

14 Q And just describe generally their service?

15 A Yes. They offer two channels, and they
16 offer it in both unicast and multicast form. So the
17 technology issue that I just was raising a few moments
18 ago.

19 They have a technology part of their
20 company that had developed an efficient way to use
21 multicast technology to provide music to listeners.
22 So the name of the company is called Multicast

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1 Technologies, and the name of the website is
2 OntheEye.com.

3 And they launched in late 2000, and are up
4 and running today.

5 Q And could you just briefly describe the
6 course of your negotiations with them?

7 A Yes. They started in late 1999, in
8 December of 1999, and we had a meeting with them
9 shortly after our first contact. They are a company
10 that is located in Northern Virginia. So we had a
11 meeting at our offices.

12 And there is an e-mail at 9094, which
13 basically says that I think we have agreed to
14 everything but the rate, and we were talking at that
15 point about a gross revenue rate, and they thought
16 that the 15 percent was too high, and wanted to talk
17 about other possibilities.

18 And so we began to discuss with them the
19 per performance option, and sent them a draft
20 agreement in early January that includes a rate of --
21 an introductory rate of .3 cents, and a rate
22 thereafter of .4 cents.

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1 And then there was a lot of back and
2 forth, in terms of negotiating specific issues or
3 language in the contract that their attorney sent
4 back.

5 This is one of the examples where the red
6 lines were going both ways, and there were a number of
7 red lines that were sent from him, and then from us
8 back to him, et cetera.

9 There were issues about the term, and they
10 wanted to cover a beta part of their website, for test
11 periods, just many, many issues. Now, one of the
12 significant issues that I remember coming up was the
13 issue of data.

14 They did not want to provide us with data
15 that we had included in all of our other contracts,
16 and to which others had agreed. So it became a
17 sticking point at one point, and in the end, they
18 agreed to pay an additional amount on a per
19 performance basis, instead of just giving us the data.

20 So I think it ended up at .425 cents
21 instead of .4 in lieu of giving us that one data
22 provision that we normally get in 3.8 or 3.9 of the

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1 other agreements.

2 And there is also an e-mail in here which
3 I thought capsulized what some of the negotiations
4 were like, and with not just them, but others. It is
5 at Bates 4075, and it was following up February 22 on
6 another meeting that we had had with them. There were
7 some open issues, and --

8 ARBITRATOR VON KANN: Hold on a second.

9 THE WITNESS: Oh, I'm sorry.

10 ARBITRATOR VON KANN: You said 4075?

11 THE WITNESS: Yes. The date is February
12 22nd, 2000. And it is probably about -- well,
13 probably about a sixth of the way through it. It is
14 towards the beginning.

15 And it shows on page 2 -- you know, the
16 issue of the arbitration came up. Let's see. Well,
17 actually, it is a different e-mail that I was thinking
18 about. I'm sorry.

19 BY MR. GARRETT:

20 Q Let me ask you to turn to Bates 3924 on
21 March 8th of 2000.

22 A Yeah, okay. I have that.

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1 Q And where on the second page there, this
2 is an e-mail, and just going to you?

3 A Yes, this is to me from Randy Freedman,
4 their attorney.

5 Q And it says that the draft accepts all of
6 RIAA's most recent changes, except for those few that
7 are absolutely unacceptable to MC.

8 MR. KIRBY: Can you tell me where you are
9 on the page?

10 MR. GARRETT: Yes, N-3925. It was an
11 e-mail that Randy Freedman sent to Steve Marks on
12 March 8th of 2000, about three-quarters of the way
13 through the document.

14 CHAIRMAN VAN LOON: Did you say March 8th,
15 2000?

16 MR. GARRETT: Yes, Mr. Chairman. There's
17 a longer draft agreement that has the Bate stamp
18 numbers N4809 also --

19 MR. STEINTHAL: Is this before that?

20 MR. GARRETT: Yes, it's before that.

21 MR. STEINTHAL: I got it.

22 CHAIRMAN VAN LOON: Go ahead. Please

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1 proceed.

2 BY MR. GARRETT:

3 Q Again, it says, "The draft accepts all of
4 RIAA's most recent changes except for those few that
5 are absolutely unacceptable to MC. Absent truly minor
6 tweakings, the attached draft is the basis on which MC
7 will move forward. And if the RIAA's unable to accept
8 the draft as written, then MC will proceed to join the
9 arbitration. I respectfully note that the above
10 ultimatum is neither an exercise in negotiation,
11 posturing or a bold attempt at strong-arming; rather
12 it reflects the reality that MC is generally tendering
13 a draft which is acceptable to it from a legal and
14 commercial perspectives in a good faith effort to
15 close the deal."

16 It says a general matter, Mr. Marks. What
17 effect did the tendency of this arbitration have on
18 negotiations with Multicast and other parties?

19 A Well, it made the negotiations difficult
20 in the sense that when the party on the other side can
21 get up and walk away or doesn't even have to come to
22 the table as in other circumstances, it makes our

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1 negotiating position that much weaker, and I think
2 that this captures the essence of it. You know, we
3 had negotiated for a number of months, had made a lot
4 of progress, were getting very close. And they were
5 basically saying, "All right. This is it. Take it or
6 leave it or we're just going to go straight to the
7 arbitration."

8 Q All right. What --

9 ARBITRATOR VON KANN: Where there
10 instances in which you got into serious negotiation
11 with somebody and at some point they pulled out and
12 said, "This is just not going to work. Sorry. We'll
13 see you down at the Library of Congress."

14 THE WITNESS: Yes. I would say that that
15 happened in other occasions.

16 ARBITRATOR VON KANN: Once, twice, several
17 times? Any idea?

18 THE WITNESS: I think there are two
19 categories. One category are webcasters who went to
20 the arbitration first and who've we subsequently,
21 after filing of direct cases, for example, have had
22 some negotiations. There are others --

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1 ARBITRATOR VON KANN: We scared them off,
2 did we? They didn't like what they saw down here?

3 THE WITNESS: There are others who we sat
4 down and negotiated with, others in the -- other
5 section of the 60 -- I guess the 35 that we didn't
6 reach deals with that we had discussions with, and we
7 just didn't end up with an agreement. In a lot of
8 cases, they didn't go to the arbitration, they just
9 sat it out and they're not here. I would say that
10 that's more of those 35 than it is those that are
11 actually here. I think that more of them fall into
12 that category of, you know, we had some initial
13 discussions and we explored things, and at the end of
14 the day they just didn't move forward for whatever
15 reason, and are either sitting on the sideline if
16 they're still in business.

17 BY MR. GARRETT:

18 Q Mr. Marks, you ultimately reached
19 agreement with Multicast, correct?

20 A Yes.

21 Q And what were the rates on which you
22 agreed?

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1 A We ended up -- let me just get to the
2 agreement itself.

3 Q Is that 70 DR, correct?

4 A Yes. Point three cents as an introductory
5 rate and 0.425 cents as the standard rate, and then,
6 again, reflected the additional amount that they paid
7 in lieu of giving us data.

8 Q There was also a long song surcharge there
9 too?

10 A Yes, which was standard in all our per
11 performance agreements. There are a number of other
12 provisions in here that were heavily negotiated and
13 were different than previous agreements.

14 Q Without describing them in detail, could
15 just generally identify the nature of those
16 provisions?

17 A Some of them had to do with technology
18 issues, some of them had to do with co-branding
19 issues. Those are a couple off the top of my head.
20 I know that we also had discussions about security
21 issues, and we had begun inserting more specific
22 security provisions in our agreements, and I know that

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1 that was something that we discussed with them as
2 well. These would be on page 5 in Section 4.

3 ARBITRATOR GULIN: When does this expire?

4 THE WITNESS: This expired I think in
5 April of this year and was renewed.

6 ARBITRATOR GULIN: It was renewed at what
7 rate, the 0.425?

8 THE WITNESS: I believe the 0.425. I'd
9 have to -- yes, it's the 0.425 rate. This we did in
10 a two-page amendment, essentially, to the original
11 agreement, so it doesn't contain every provision that
12 the original does.

13 ARBITRATOR VON KANN: Where there have
14 been rules of the agreements, have they generally been
15 on the same rates and terms as the original agreement
16 or have they generally involved changing the terms and
17 rates?

18 THE WITNESS: The rates have generally
19 been the same. I would say that the one thing that
20 has changed in one or two instances is the structure
21 of the agreement. With Music, Music, Music, we
22 dropped the operating expense formula and went to a

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1 combined revenue per performance deal. So the
2 agreements changed, but the rates are similar either
3 to the rates that were in the initial contract or
4 other deals that we've done.

5 ARBITRATOR GULIN: When there's been an
6 introductory rate and then an expiration, the renewal
7 is at the --

8 THE WITNESS: The renewal is generally at
9 the latter rates, but I want to reserve the right to
10 look back. There may have been some in between
11 interim rate or something.

12 ARBITRATOR GULIN: Because if you look at
13 some of these agreements, they're for a short period
14 of time, and when you factor in the introductory rate
15 to the entire rate, you're looking at something a
16 little bit different than --

17 THE WITNESS: Yes. I can explain that.
18 What happened was when we initially started doing the
19 deals, we were focused on doing them consistent with
20 the initial two-year statutory license period. When
21 we started with MMM, that was a year and three-
22 quarters. By the time we got to WWW, for example,

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1 that deal was done in January and it expired at the
2 end of the year. Multicast we did a year from the
3 date, so it was April to April of this year. Shortly
4 thereafter, we started doing the deals through the
5 2002 period as well.

6 So that's why there's just a handful of
7 deals that would need to be renewed, most of the ones
8 at the beginning. And then most of the ones halfway
9 through and beyond are still in that initial term and
10 would be through '02 or there may be option periods or
11 with GaliMusica, for example, an extended year.

12 CHAIRMAN VAN LOON: Was part of your
13 persuasiveness in your negotiations and discussions
14 with them be that, "We've done five other with this
15 provision, this is our standard form, and we're
16 looking to have uniformity in approach," things of
17 that nature?

18 THE WITNESS: Yes. I think that there are
19 two different types of provisions. There are
20 provisions that go to the heart of the consideration,
21 such as the rates and the other promotional
22 consideration that we generally obtained in the

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1 agreements. And to the extent that others had agreed
2 to it, we viewed that, essentially, as marketplace
3 precedent, and we did discuss that with whoever we
4 were negotiating with at that time.

5 There are other types of provisions
6 regarding reporting, for example, audits, et cetera,
7 and we attempted to keep those as standard as possible
8 just so that our heads weren't spinning in remembering
9 if there was any difference when trying to apply
10 something like that in each particular agreement. But
11 on many occasions, even with those provisions we had
12 to make changes. There are a number of agreements
13 where there were substantive changes, looking at from
14 Section 5 onward, others there were language changes,
15 et cetera.

16 BY MR. GARRETT:

17 Q You had four other agreements that you
18 entered into before you entered into the Yahoo
19 agreement, correct?

20 A Yes.

21 Q Slam, Fansedge, Cybertainment, and
22 Soundbreak, correct?

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1 A Yes.

2 Q Let me distribute all four of those right
3 now.

4 ARBITRATOR VON KANN: Let me ask this
5 while the paper's coming: You said that on the --
6 that some of the things went to the very heart of the
7 agreement, including the rates. And we've seen
8 instances in which you were willing to grab various
9 introductory rates, but thus far I don't think we've
10 seen anything where ultimately the long-term
11 percentage of revenue was anything other than 15
12 percent; is that right?

13 THE WITNESS: I think that's right for our
14 gross revenue deals. For the per performance deals,
15 there were some differences. WWW had a 0.35 rate. I
16 believe Multicast had the 0.425 because of the data
17 provision. There were some differences there.

18 ARBITRATOR VON KANN: My question is, how
19 did the RIAA arrive at 15 percent? Why not ten
20 percent, why not 20 percent, why not 14 percent, why
21 not -- why 15?

22 THE WITNESS: Well, when we sat down

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1 initially back at the beginning of 1999 to talk about
2 this, as I said earlier, we were focused on a gross
3 revenues because of --

4 ARBITRATOR VON KANN: I know they were
5 comfortable with the concept --

6 THE WITNESS: Right.

7 ARBITRATOR VON KANN: -- the question is
8 the number.

9 BY MR. GARRETT:

10 Q I'm sorry, when you say "we," tell us who
11 you're referring to.

12 A The negotiating team. And that comfort
13 level extended to the rate. We had discussions about
14 what rate we thought was appropriate. I shouldn't say
15 we including me, really, it was the negotiating team.
16 And 15 to 20 percent was the sweet spot, so to speak.
17 That's where they thought the rate should end up.

18 ARBITRATOR VON KANN: Fifty percent is
19 sweeter.

20 THE WITNESS: Right, that's true. But
21 that was the target range, and we took that rate out
22 into the market.

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1 ARBITRATOR VON KANN: And was this gut
2 feelings by these people in the industry that that was
3 the rate where -- as opposed to a particular precedent
4 or a particular calculation that they went through?

5 THE WITNESS: I think it was the
6 collective expertise and experience of the negotiating
7 team. I mean there were decades of licensing
8 experience, and there was also many, many people on
9 the Committee who were working with webcasting and
10 other new media companies, and they had, therefore,
11 been forecasting themselves individually where they
12 thought various rates should end up for different
13 types of services. And it wasn't as if we had one
14 phone call and plucked a number out of the air. They
15 all brought into our collective discussions their
16 thoughts and experience, and that was the range of
17 rates that they thought was appropriate.

18 BY MR. GARRETT:

19 Q Let me, if you can, just deal very
20 generally here with the next four for Slam, Fansedge,
21 Cybertainment, and Soundbreak. The Slam, Fansedge,
22 and Cybertainment were all per performance deals,

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1 correct?

2 A That's right.

3 Q And could you briefly describe who Slam,
4 Fansedge, and Cybertainment are and whether they're
5 still in operation?

6 A Slam is a company that has about 11
7 channels of music. They're based out in Seattle,
8 Washington, and they are still operating, although I
9 think they may have ceased operations for a month or
10 two earlier this year, but they're still operational.
11 And in fact they won best streaming audio site award
12 earlier this year at some conference.

13 So Fansedge was a little bit different.
14 Fansedge was a site dedicated to sports fanatics, and
15 they wanted to have as one section of the site called
16 the Lounge Area where basically the sport fanatic,
17 couch potatoes would come and sit down in a virtual
18 lounge and listen to music while they were there.

19 Q Just don't listen to NPR, you mean?

20 A Right. So they were different; they
21 weren't a music site. Cybertainment is a music site
22 that is -- Fansedge, by the way, has since gone out of

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1 business. Cybertainment is a music site that's still
2 operational that has about eight channels of music, I
3 think. And they have some other individual deals I
4 believe they've done with a classical company, for
5 example, and they're branching out to offer
6 subscription services as well as the non-subscription,
7 the MCA-compliant service. And all of those were per
8 performance agreements.

9 Q Slam was at 0.4 plus one song surcharge;
10 is that right? That's in 71 DR.

11 A Yes. The per performance rate in Slam is
12 0.4.

13 Q Fansedge was introductory rate of 0.325
14 for the first six months and then 0.4 for the next six
15 months?

16 A That's right.

17 Q And that's at 72 DR?

18 A Yes.

19 Q And Cybertainment was at 0.4; is that
20 right?

21 A Yes.

22 Q Now, then the next deal you had was with

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1 Soundbreak, correct?

2 A Yes.

3 Q And that took a little bit different form
4 than the other agreements, correct?

5 A Yes.

6 Q Why don't you talk a little bit about
7 Soundbreak, but were any of the deals that you had up
8 to this point with a DiMA member?

9 A I do not believe so. Let me just go back
10 over the list to make sure. No.

11 Q Okay. Soundbreak was a DiMA member,
12 correct?

13 A No. They were not a DiMA member at the
14 time that we began discussing the contract with them.
15 They became a DiMA member officially the same day they
16 signed the contract. They did a dual press release
17 where they announced our deal as well as joining DiMA.

18 Q Okay. Just tell us a little bit about
19 Soundbreak.

20 A Soundbreak was, one might term, a
21 lifestyle site. It was dedicated to a certain group
22 of music lovers, RB and hip hop, and in addition they

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1 had music there, but, as well, they had a number of
2 other items that revolved around the lifestyle of the
3 listeners that they were targeting. And they launched
4 with a fair amount of press and fanfare back in fall
5 of 1999 with not only some funding but some well-known
6 people in the industry who were behind the Company.

7 And we had some discussions back in 1999
8 with an attorney for them, but then the discussions
9 broke off, and we picked up discussions next in March
10 of 2000, and that was with Lisa Crane, the then CEO of
11 Soundbreak. And I had some discussions with Lisa. We
12 met at an NAB conference out in Las Vegas, and we
13 talked generally about rates. She thought at the time
14 the rates were too high. I think we may have talked
15 about gross revenues, primarily, but we may have
16 talked about other structures as well.

17 And then a couple of months later she and
18 I were on a panel together at another industry
19 conference, and we began discussing at that time
20 reengaging and possibly doing a deal. And the way we
21 structured it was different than the way we had
22 structured other deals. We essentially accepted a

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1 flat fee upfront payment that covered a certain number
2 of performances, and they were able, by giving us this
3 guaranteed upfront payment, to buy down the rate. So
4 instead of the rate being 0.35 they paid us, I
5 believe, \$150,000 for up to 50 million performances
6 and then would pay a per performance rate above that.

7 CHAIRMAN VAN LOON: What was that
8 arithmetic of 150?

9 THE WITNESS: That would 0.3 rate instead
10 of 0.35 rate.

11 BY MR. GARRETT:

12 Q Mr. Marks, their agreement is at 74 DR,
13 correct?

14 A Yes.

15 Q And the license fees amount is in Section
16 3.1 on page 4; is that right?

17 A Yes.

18 Q Perhaps you could just refer to that as
19 you --

20 THE WITNESS: Yes, 3.1. It was \$150,000
21 as well as \$15,000 for the ephemeral, which was the
22 ten percent. That covered the first year or up to 50

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1 million performance, whichever came first. And if
2 they got to the 50 million performances before the end
3 of the year, they would pay a rate over the --

4 ARBITRATOR GULIN: Which came first?

5 THE WITNESS: They -- well, what came
6 first was they went out of business about eight months
7 into the year, so that came first.

8 (Laughter.)

9 ARBITRATOR VON KANN: Did they make any
10 payments?

11 THE WITNESS: No. They made the \$150,000
12 -- they actually paid about \$178,000 that covered the
13 initial 150, the \$15,000 for the ephemeral, and then
14 -- oh, and then a \$13,000 payment that covered
15 performance that they had made in a few months
16 preceding the date of the execution.

17 ARBITRATOR VON KANN: It's like a mortgage
18 where you pay a few points upfront and buy down the
19 long-term rate.

20 THE WITNESS: Exactly. It was a way for
21 us -- it was another way for us to get a deal done.
22 They wanted to pay -- they thought, "Well, maybe 0.35

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1 is a little too high; we'd be okay if it was 0.3." So
2 we worked something out where, okay, if we have the
3 money in our hand, we view that as relatively
4 consistent. And then there were payments for each of
5 the following two years that would have been due as
6 well. And then a number of additional consideration,
7 as in some of our other agreements.

8 BY MR. GARRETT:

9 Q And by that you're referring to what
10 exactly?

11 A The public service announcements, the buy
12 buttons, surveys, and additional reports on listeners.
13 Those are all on pages 5 to 6 under Section 3.3.

14 Soundbreak was a company that raised -- I
15 mean they were very well-funded. They raised about
16 \$23 million. They had Mark Goodman, who is one of the
17 original MTV VJs, as the head of their programming.
18 So they were a very well-known site at the time we did
19 the deal.

20 Q All right. That then brings us to the
21 deal with Yahoo. They were the next license that you
22 signed, correct?

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1 A Yes.

2 ARBITRATOR VON KANN: They were 16 by my
3 count, does that sound right?

4 CHAIRMAN VAN LOON: Sixteen, yes.

5 BY MR. GARRETT:

6 Q The agreement itself is at 75 DR?

7 A Yes.

8 ARBITRATOR VON KANN: While these papers
9 are being passed, can I ask you this: Is the
10 situation with respect to the -- obviously, your per
11 performance rates are sort of clustering around 0.3 to
12 0.4 with some variations in there and so on. Again,
13 my question is, how did the RIAA Negotiating Committee
14 come to that number? It may be the same kind of
15 answer, it was sort of a judgment call, but was there
16 anything more detailed or calculating?

17 THE WITNESS: Well, we -- basically, when
18 we began to think about a per performance as an option
19 in the spring, we began to run some analyses based on
20 the numbers that we had. Obviously, we were trying to
21 peg it to something that we thought would eventually
22 get us the same thing that a 15 percent rate would be,

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1 so that was relevant. And there were some other
2 things that we were looking at in different context.
3 We actually came up with much higher per performance
4 rates and thought we had good reasons for having the
5 rate be higher. Point five to 0.75 you saw in some of
6 our original agreements was where the proposed
7 agreement ended up, and we ended up negotiating that
8 range down to about 0.35 to 0.4 -- I should say the
9 webcasters with whom we were negotiating negotiated
10 down to about 0.35 or 0.4, but that's where things, as
11 you say, started clustering, and it seemed to be the
12 rate around which people were agreeable.

13 BY MR. GARRETT:

14 Q You talked about the relationship between
15 0.35, 0.4, and 15 percent. We've done some
16 calculations in this proceeding which show that when
17 applied to specific webcasters we get some very
18 different numbers depending upon whether you use 15
19 percent or 0.4. Can you explain why that's the case?

20 A Well, it wouldn't surprise me if the
21 numbers were very different today, because revenues
22 might be very low today. We were looking at this not

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1 in terms of is this rate going to be equivalent to 15
2 percent in the next year or two, because we had a very
3 long-term vision of this business, and that's what we
4 were in the marketplace to discuss and achieve. So we
5 were not looking at it in terms of 15 percent of the
6 money they may be collecting in 1999 or 2000, but we
7 were looking farther out. Our goal was to come to an
8 industrywide business resolution that was going to get
9 us not just this next two-year period but set the
10 framework for something well beyond it. So our focus
11 was beyond just the year or two we might have been
12 dealing with at that time.

13 ARBITRATOR VON KANN: Did I understand you
14 to say that the per performance rate was, in effect,
15 backed out of the percentage of revenue rate? Your
16 feeling, the Committee members, long-term felt that 15
17 percent of revenue was a fair rate, and for people
18 that wanted to do it on a performance basis you did
19 some calculations and concluded that somewhere around
20 this level, 0.35, 0.4, once the revenues got up to
21 where you sort of thought they were going would get
22 you about the same thing as 15 percent of revenue?

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1 THE WITNESS: I think backed out may be
2 overstating it a little bit, but I do think that the
3 15 percent was relevant.

4 ARBITRATOR VON KANN: Okay.

5 BY MR. GARRETT:

6 Q What effect then did financial projections
7 of webcasters --

8 COURT REPORTER: Mr. Garrett, I'm having
9 trouble picking up your voice.

10 BY MR. GARRETT:

11 Q What effect, if any, did financial
12 projections of webcasters have in assessing the
13 reasonableness or the propriety of the rates that you
14 were looking for?

15 A They were very relevant. I mean that's
16 what we were looking at when we'd sit down and speak
17 with an individual webcaster or when our companies
18 were dealing with many of these same companies or
19 related companies. They understood where the
20 projections in terms of not only the cost structures
21 of these companies but revenues and CPM rates and all
22 of those things that would go into analyzing the

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1 financials of a business.

2 Q Okay. Let me ask you --

3 MR. STEINTHAL: I'm going to interpose an
4 objection and move to strike. It's very interesting
5 that Mr. Marks now has this opinion after reading Dr.
6 Nagle's report, but it's nowhere in the direct
7 examination about what was discussed. Indeed, it's
8 nowhere in the direct examination or cross examination
9 of any of the Negotiating Committee witnesses, and it
10 is nowhere in the direct testimony of Mr. Marks in
11 this case. So it's very interesting that he now has
12 this view, but it's clearly beyond the scope of the
13 direct and should be stricken.

14 MR. GARRETT: Well, two things: First of
15 all, I think it was a reasonable follow-up to the
16 questions that Judge von Kann was asking, and, two, I
17 am certain that Mr. Steintal will cross examine Mr.
18 Marks about that in the nature of the reasons that he
19 had for those opinions here.

20 MR. STEINTHAL: And the reasons he didn't
21 put it in his direct case to begin with? I mean this
22 is really beyond the scope.

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1 CHAIRMAN VAN LOON: We're going to need to
2 overrule the objection on the grounds that it's very
3 close to what the Panel was asking about and closely
4 linked to that.

5 BY MR. GARRETT:

6 Q Now, first of all, Mr. Marks, just
7 describe the Yahoo service.

8 A Well, Yahoo acquired a company called
9 Broadcast.com in mid-1999. Broadcast.com was an
10 aggregator of content, mainly music content but they
11 had a number of -- they retransmitted a number of
12 radio stations. They also aggregated some Internet-
13 only and archived Internet-only programming, live and
14 archived programming. At the time we did the deal, I
15 believe there were about 400 stations on the site, 300
16 of which were music. So about 75 percent of the
17 stations that they were retransmitting were music
18 stations. And then they had other stations -- news,
19 talk, sports -- a number of different categories that
20 made up the other 25 percent.

21 And Broadcast.com had been a DiMA member
22 from, I believe, the very beginning and was part of

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1 the discussions, the negotiations over the DMCA
2 amendments to Sections 112 and 114. Broadcast.com was
3 at that point, not Yahoo.

4 Q All right. Could you describe the course
5 of the negotiations with Yahoo?

6 A Sure. The negotiations began in the last
7 spring/summer of 1999. This was one of the couple of
8 instances where we contacted the licensee, the
9 eventual licensee, and that was done by me contacting
10 Mark Cubin who was one of the founders of
11 Broadcast.com. And we had a meeting with them in July
12 of 1999 where I went to Dallas and we discussed a
13 possible licensing arrangement. And there were term
14 sheets that were passed back and forth for a couple of
15 months. We sent one term sheet, I believe, in July
16 and maybe one other in August and had some discussions
17 around that time around it. We also signed a
18 confidentiality agreement with them regarding
19 negotiations at their request.

20 And what happened was -- what happened was
21 -- well, do you want me to talk about the term sheets
22 a little bit?

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1 Q Yes, just talk just very briefly about the
2 issues that -- the special issues that arose here in
3 the context of the negotiations with Yahoo.

4 A Yes. There were two things that made
5 Yahoo very different than anybody else we were talking
6 to. The first thing is that they were retransmitting
7 over-the-air radio signals, and at that time
8 broadcasters had made very clear that they were
9 claiming that when they retransmitted their own
10 signals they were exempt. And, therefore, there was
11 great uncertainty about whether there was going to be
12 any payment at all depending on how that legal issue
13 eventually was resolved with the broadcasters. And
14 therefore, Broadcast.com and then Yahoo, to the extent
15 that they were retransmitting those same stations,
16 would have been competing potentially with zero. And
17 that influenced the discussions around the radio rates
18 very much.

19 The other part of that, still in the first
20 distinction, was that there's also an exemption for
21 retransmissions of radio stations within 150 miles of
22 the station. And there was -- Yahoo certainly

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1 believed that there was an argument that any of the
2 transmissions that they were making within the 150
3 miles of the station would have been exempt, separate
4 and apart from whether the broadcasters prevailed on
5 their claim for an exemption for all over-the-air
6 signals. So that was -- those were two facts that
7 greatly influenced our discussion about the radio
8 retransmission part of their business.

9 The other significant atmospheric, so to
10 speak, was the fact that we really wanted to get a
11 deal done with one of the big players, and I would
12 have to go back and look through each of these term
13 sheets, but we were talking with them about per
14 performance rates -- initially, I see it in here as
15 0.25 cents and then down to 0.2 cents, et cetera --
16 that were lower than with other companies.

17 Now, what ended up happening in terms of
18 chronology was that we had a couple of term sheets and
19 some discussions back in the summer of 1999. And then
20 there were repeated efforts on our behalf to engage
21 them. We weren't getting any response to the term
22 sheets. We weren't being ignored. Yahoo told us

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1 repeatedly that they'd be in touch, et cetera. And at
2 some point in the fall, somebody at Broadcast.com
3 basically said, "Things are changing because the Yahoo
4 team is now in place and looking at this."

5 They had been acquired in May or June of
6 '99. The discussions we were having with them were
7 all with the original Broadcast.com founders and
8 employees or officers. And as Yahoo was transitioning
9 their team into place, there was a fair amount of time
10 where nothing happened. And I think that that
11 extended into early 2000 when on January 31 we got a
12 counterproposal to the August term sheet that we had
13 sent. So you could see there were about four or five
14 months before we got a formal counterproposal.

15 CHAIRMAN VAN LOON: Which month did you
16 get the counterproposal?

17 THE WITNESS: January 2000, and we had
18 sent our proposal in August of '99. At that point,
19 and over the course of the next month or two, things
20 began to pick up, and there were a number of
21 negotiations back and forth the various rates for
22 radio retransmissions, one rate, and a different rate

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1 for Internet-only. We went back and forth a couple of
2 times on blended rates so that there'd be one rate for
3 everything. And as I said, the discussions went
4 through into the spring of 2000. There's not a lot
5 more to say than the fact that there was a lot of back
6 and forth about the various rates and a couple of the
7 terms, I believe.

8 The other thing that we were putting
9 together, and that was a main component of the deal,
10 was that we were going to be getting a lump sum
11 payment from them that was extremely large, in the
12 million to million and a half dollar range. It
13 changed over time. It eventually ended up at a
14 million and a half, which was obviously a large amount
15 of money and much larger than we had obtained or
16 received from others. And in the same way that
17 Soundbreak bought down the rate, our feeling was in
18 getting this lump sum, even though a large portion of
19 it was for back performances or past performances, it
20 was still a consideration for giving them something
21 lower.

22 So you had all of these different factors

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1 at play, the issue specifically with the radio
2 retransmissions. And by the time the negotiations
3 were really rolling in the spring of 2000, the
4 rulemaking proceeding in the Copyright Office to
5 determine that issue had begun, so it was a real live
6 controversy at that point in terms of it being
7 addressed.

8 And then you had these other two issues.
9 One was the fact that -- our desire to get a rate with
10 a large player, and the other was the fact that they
11 could give us a large fee that could buy down the rate
12 a little bit. Remember that even though part of the
13 payment was for past performances, we were -- they had
14 signed up for the arbitration, so we were looking at
15 possibly not getting that money for more than two
16 years later. So even though it covered past
17 performances up to that time, it was in some respects
18 an advance, because it was a very large amount of
19 money that we were going to have in our hands two
20 years earlier than we would have.

21 BY MR. GARRETT:

22 Q How did the pendency of the arbitration

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1 affect the negotiations with Yahoo?

2 A I think it affected those negotiations in
3 much the same way it did a number of our other
4 negotiations. We knew that Yahoo could walk away at
5 any time, and indeed we thought they had during that
6 four- or five-month period where we didn't receive any
7 information from them. Originally, the arbitration
8 was scheduled to begin in March of 2000, and it was
9 delayed because of the Copyright Office rulemaking on
10 the radio retransmission issue, or the radio simulcast
11 issue. So there were direct cases being prepared
12 around that time that was in between the time that we
13 eventually received our counterproposal on the term
14 sheet.

15 Q Did you think that negotiating with Yahoo
16 would have any impact on the arbitration?

17 A Yes. Our hope was that doing a deal with
18 one of the big three would have the effect of
19 providing that additional momentum to the other deals
20 that we had completed in the market and bring the rest
21 of the people at least to the table if not to complete
22 resolution. I mean the Yahoo deal was essentially a

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1 bet. We were betting that giving them a rate that we
2 thought was below the rate that was appropriate for
3 performances and under the statutory license was worth
4 it because it would provide the momentum to get an
5 industry deal done and avoid an arbitration and avoid
6 all of that uncertainty. And that obviously didn't
7 happen, but that was the bet that we made at the time
8 of the Yahoo deal.

9 ARBITRATOR VON KANN: Looking in the book,
10 I've got a document that's -- I guess this is your
11 term sheet, your August '99 term sheet. It's RN11732.
12 Am I on the right document? This is a note or an e-
13 mail from you to Todd and Belinda, whoever they are,
14 enclosing on the next page --

15 THE WITNESS: Yes.

16 ARBITRATOR VON KANN: -- the term sheet.

17 THE WITNESS: I'm there, yes. Todd Wagner
18 is one of the co-founders of Broadcast.com and brought
19 -- Belinda Johnson was their General Counsel. And
20 this was a follow-up to the initial meeting that we
21 had and some of the discussions that we had around
22 that time. So that was the proposal that we sent in

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1 August and eventually got a counterproposal in
2 January.

3 So just to follow-up, this was -- there
4 was a lot of angst over whether to do this deal
5 because of this bet. I mean there were -- we had
6 many, many discussions on the Negotiating Committee
7 about whether this was worth it, because we knew that
8 if we weren't successful and there was an arbitration,
9 that this 0.2 rate that we thought was below, and the
10 radio retransmission rate as well, was going to come
11 into this arbitration. And that was -- there was a
12 lot of back and forth about whether to do that and
13 some of the other terms and how far to go, and
14 eventually we obtained consensus on moving forward
15 with the deal, as it was eventually signed.

16 BY MR. GARRETT:

17 Q What made you think that doing a deal with
18 Yahoo would be any different than the other deals that
19 you had done in terms of spurring some type of
20 settlement here?

21 A I think there are a few reasons. One is
22 that they were one of the big three, as we've talked

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1 about in this proceeding, along with MTV and AOL. And
2 they were a DiMA member as well, and they were in the
3 arbitration. So we thought that by doing a deal with
4 somebody who was a DiMA member and somebody who was in
5 the arbitration and somebody who was of that size,
6 that it would provide that inertia that we were
7 looking for on top of the other deals that we had done
8 to achieve an industrywide agreement.

9 ARBITRATOR VON KANN: In what sense are
10 you using the term "big three?"

11 THE WITNESS: AOL, MTV, and Yahoo were the
12 three that we viewed as the largest players in the
13 webcasting space around that time.

14 ARBITRATOR VON KANN: They're all big
15 companies, that we know, but did you believe or did
16 you have reason to think they had the biggest
17 listenership at that point?

18 THE WITNESS: We did have reason to
19 believe that they had over a billion performances up
20 to that point, and I don't believe that either MTV or
21 AOL had that many. Spinner may have had something
22 close to that, I'm not sure. But I don't believe MTV

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1 did. So in terms of number of performances and
2 transmissions, they were clearly one of the biggest,
3 if not the biggest.

4 BY MR. GARRETT:

5 Q All right. Why don't we move then from
6 Yahoo to the next you had, which was with Spike Radio?

7 ARBITRATOR GULIN: No, I'll tell you what,
8 I want to try to get a little bit of an understanding
9 for the rate structure for Yahoo. There's apparently
10 a separate rate for simulcasting and for Internet-
11 only, correct?

12 THE WITNESS: Yes. It's actually one rate
13 for radio retransmissions and one rate for everything
14 else.

15 ARBITRATOR GULIN: Okay. The initial term
16 was -- when does the initial term expire, at the end
17 of this year?

18 THE WITNESS: The initial term expired at
19 the end of last year.

20 ARBITRATOR GULIN: Last year.

21 THE WITNESS: And Yahoo renewed it. They
22 had two one-year options under the agreement, so they

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1 renewed it for the first year, which is 2001, and they
2 have one more option and can renew it for next year.

3 ARBITRATOR GULIN: Okay. Let's talk about
4 the initial term for a moment.

5 THE WITNESS: Okay.

6 ARBITRATOR GULIN: The rate there was,
7 with respect to Internet radio performances, 0.2 cents
8 per performance after 1.5 billion performances,
9 correct?

10 THE WITNESS: That's correct.

11 ARBITRATOR GULIN: During that initial --
12 and as a matter of fact, up until 1.5 billion
13 performances, have you done the math to determine what
14 the effective rate was?

15 THE WITNESS: The effective rate -- well,
16 they paid \$1.25 million for -- it was really 1.375
17 billion, but we threw in some free goods for the
18 technical --

19 ARBITRATOR GULIN: So it was really 1.5
20 billion.

21 THE WITNESS: Right. So it was 1.5.

22 ARBITRATOR GULIN: So that works out to

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1 about what, a little under a tenth of a cent?

2 THE WITNESS: Yes, it's about 0.9, I
3 believe.

4 ARBITRATOR GULIN: Point 09.

5 THE WITNESS: Point 09, yes.

6 ARBITRATOR GULIN: All right. Now how
7 many actual performances did they have in that initial
8 term, if you know?

9 THE WITNESS: In the initial term -- well,
10 remember, the 1.5 -- this payment was just for that
11 number of performances, not -- it wasn't tied to a
12 specific date.

13 ARBITRATOR GULIN: Okay.

14 THE WITNESS: Okay? So it was just tied
15 to the number of performances. So they might have --
16 I don't remember the exact number that they had as of
17 the date we signed, which was late August of 2000, but
18 it was close to the full amount. It was over a
19 billion. I just don't know how much over. So they
20 might have, the very next month, gone over 1.5 and
21 would have begun paying on the 0.2 and 0.05 rates. As
22 it turned out, I believe they didn't hit that number

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1 until late 2000. I apologize, I just don't know the
2 exact date.

3 ARBITRATOR GULIN: But the point is that
4 at this point they're beyond the 1.5 performances, so
5 right now they are in fact paying the 0.2 cent rate
6 and the 0.05 cent rate.

7 THE WITNESS: Yes.

8 ARBITRATOR GULIN: Okay. Thank you.

9 BY MR. GARRETT:

10 Q Incidentally, you're aware that Yahoo has
11 acquired Launch?

12 A Yes.

13 Q And do these rates cover the Launch
14 service?

15 A Yes. The 0.2 rate would cover Launch's
16 pre-programmed service.

17 MR. GARRETT: Judge Gulin, was there
18 anything else on that?

19 ARBITRATOR GULIN: No.

20 BY MR. GARRETT:

21 Q Then let's move to Spike Radio.

22 A Do you want to go through these --

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1 CHAIRMAN VAN LOON: Before we do that, why
2 don't we take our break?

3 MR. GARRETT: Sure.

4 CHAIRMAN VAN LOON: So we'll come back at
5 five past five.

6 (Whereupon, the foregoing matter went off
7 the record at 4:47 p.m. and went back on
8 the record at 5:04 p.m.)

9 BY MR. GARRETT:

10 Q Before we move to Spike Radio, Mr. Marks,
11 there are a couple of things in the Yahoo agreement
12 that are a little bit different than some of the other
13 agreements, and I wondered if you could just highlight
14 those?

15 A Sure.

16 Q Just wait one second. First of all, the
17 agreement itself is in 75 DR, correct?

18 A Yes.

19 Q Okay. If you can just highlight the
20 things that are significant here.

21 A Well, a number of them relate to issues
22 surrounding the retransmission of radio. For example,

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1 we had this notion on page 2, in Section 1.3, of
2 incidental performances and how to deal with them.
3 And so there's a definition of what an incidental
4 performance is, which would be an incidental use of
5 music on some non-music related programming, such as
6 a jingle in a commercial or some ambient music being
7 played in the background of a sporting event or
8 something like that.

9 ARBITRATOR VON KANN: Do those come out of
10 the per performance count?

11 THE WITNESS: Those were excluded from the
12 number of performances. And then -- well, maybe it's
13 -- it's probably easiest just to move through the
14 agreement. In 1.8, one of the concessions that we had
15 to give in this agreement was Yahoo wanted to be able
16 to send us their check and not have to worry about any
17 performances from any other sound recording copyright
18 owners, and therefore wanted us to take on the burden,
19 essentially, of paying whatever, to the extent that
20 they were playing music that was owned by other sound
21 recording copyright owners, that we would take on the
22 burden of passing that through.

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1 CHAIRMAN VAN LOON: To the non-Exhibit A
2 owners.

3 THE WITNESS: Exactly. And that was
4 certainly a concession. It was something that we
5 thought was not a great concession, because our goal
6 was to ramp up to 100 percent, and we hoped to do that
7 soon, in any event. And we knew that the overwhelming
8 majority of music is going to be from our members, but
9 it was certainly something that we did not do --

10 ARBITRATOR VON KANN: Where is that
11 reflected?

12 THE WITNESS: That's in -- I believe it's
13 in 1.8 in the definition of -- it says "means all
14 sound recordings protected by copyright as opposed to
15 referring to Exhibit A."

16 The other reason that we thought that
17 wouldn't be burdensome to us was that the Copyright
18 Office had designated us in the last arbitration
19 proceeding to be the entity that collected for
20 everybody, and we were anticipating that there was
21 certainly a significant possibility we'd be doing that
22 again. So in terms of -- it wasn't as if we were

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1 taking on additional administrative expenses than we
2 otherwise would have had if we assumed that role.

3 There was an ephemeral fee paid in
4 addition to the \$1.25 million. That was \$108,000, I
5 believe.

6 CHAIRMAN VAN LOON: One hundred and eight
7 thousand?

8 THE WITNESS: Yes. I'm trying to find it.

9 ARBITRATOR GULIN: The first year?

10 THE WITNESS: The first year was -- yes,
11 it was a 108 as a bulk payment. Yes, it's in 3.1(b).
12 So it was for all ephemerals through the end of 2000,
13 and then there's a \$50,000 payment per year thereafter
14 in 3.4. And additionally, in -- let's just -- maybe
15 it will make sense just to walk through Section 3 for
16 a second, because there are a number of provisions
17 there.

18 In 3.1, we've already discussed the number
19 of performances that were covered by the initial fee.
20 There's the additional \$108,000, and then there's a
21 \$10,000 payment for feature performances on non-music
22 channels. So that would include, as opposed to

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1 incidental uses of music, like background and ambient
2 music, those would be actually featured uses on those
3 channels. And those could be, for example, a theme
4 song for a radio show that's played at the beginning
5 and the end of every show.

6 In 3.2, in the first renewal term, you can
7 see that the rate -- there's a five percent volume
8 discount for performances over a billion during the
9 first renewal term, which would be the year 2001. And
10 in the second renewal term, the rates are increased by
11 five percent, so the rates go up to 0.21 until they
12 hit two billion performances. In the event they hit
13 two billion performances, the rate would be 0.2, and
14 in the event that they hit three billion performances,
15 the rate would be, I guess, 0.19. So there was both
16 an increase in the rates, consistent with essentially
17 having an increase for inflation or rates going up
18 nominally in the future, but also had built in the
19 volume discount as well if they hit two billion and
20 then three billion performances.

21 CHAIRMAN VAN LOON: And the second renewal
22 term goes through the end of '0 --

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1 THE WITNESS: Two.

2 CHAIRMAN VAN LOON: two.

3 THE WITNESS: Yes, 2002 is the second
4 renewal term.

5 ARBITRATOR GULIN: There's no
6 differentiation between performance, whether it's a
7 retransmission or an Internet radio performance,
8 correct? It doesn't matter. They're both -- they're
9 commingled for all these provisions.

10 THE WITNESS: Commingled in the sense --
11 in counting the performances --

12 ARBITRATOR GULIN: Yes.

13 THE WITNESS: -- up to the billion or the
14 two billion or three billion?

15 ARBITRATOR GULIN: Right.

16 THE WITNESS: Yes. It's just a
17 chronological thing. So the minute -- whatever's the
18 next performance over the combined billion, they pay
19 at those rates.

20 ARBITRATOR GULIN: Even though you have
21 separate rates, theoretically, you could have all the
22 performances being in one category and still you'd

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1 have -- the new rates would kick in. The separate
2 rates would kick in after the 1.5 billion performances
3 in the initial term, for example.

4 THE WITNESS: Yes, yes. Okay. In 3.24,
5 there's a blanket rate for featured performances on
6 non-music channels for the additional years. They
7 paid the \$10,000 as part of the additional payment,
8 but then there's a \$5,000 per year payment there. In
9 terms of the monthly payments, there were a number of
10 reporting issues relating to how this was all to be
11 calculated, and in 3.51, you can see that for purposes
12 of calculating radio retransmissions there's 11.55
13 performances per hour and 16 performances per hour for
14 Internet radio. So those were the assumed number of
15 performances that they would pay based on.

16 In 3.6, there is a most favored nations
17 clause that applies to similar types of services.
18 It's called substantially comparable webcasters, and
19 there's a definition of what a substantially
20 comparable webcaster would be. And that included
21 gross revenues of the parent company, number of
22 transmissions. So it was limited to -- the idea here

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1 was to limit it to other large players that would be
2 viewed in the same category as Yahoo.

3 ARBITRATOR GULIN: Could you tell us what
4 it basically provides, what kind of a most favored
5 nation --

6 THE WITNESS: It provides -- just give me
7 a minute. It's a straight MFN. So if we were, for
8 example, to give -- hypothetically, we do a deal with
9 AOL. AOL meets the criteria and the definition of
10 3.61, if they do, and we did a per performance at 0.19
11 with them. Then Yahoo would get the benefit of that
12 rate. That was the first MFN that we had ever done
13 like that. It was something that Yahoo wanted. It
14 was, frankly, something that we -- it was, obviously,
15 a concession, but not, in our minds, a major
16 concession, because the way we viewed Yahoo was,
17 "Here's as low as we're going." You know, we were
18 giving them rate because they were the first to sign
19 on and to get others to the table. So we didn't
20 expect that that would kick in.

21 Three point seven, the additional
22 consideration -- we have in 3.7.1 public service

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1 announcements. In 3.7.2, buy button links. In 3.7.3,
2 the issue that's been talked about previously, which
3 was -- and this was one of the reasons we did the deal
4 was to get them out of the arbitration and to, more
5 importantly, provide hopefully an end to the
6 arbitration process. This just set forward them
7 coming out of the arbitration, how many business days,
8 and has the language about not cooperating with
9 anybody on the other side. And the idea there was you
10 do a business deal, you don't expect to see the other
11 person on the other side in a litigation.

12 And then in Section 4, there are just a
13 number of reporting issues which I don't think we need
14 to go through, but they differ from some of the other
15 provisions in the other deals, because they include
16 radio retransmissions, and Yahoo had this problem of
17 going to the rate -- remember, they were just
18 retransmitting, so they weren't programming the
19 content. They needed to get all this information on
20 sound recording usage from the radio stations
21 themselves.

22 So we had provisions. You can see they're

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1 pretty intricate about what percentage -- you know,
2 they would always give us recording title, featured
3 artist, length, and data and time of performance.
4 They would give us album title for 50 percent, and
5 then 60 percent a year after and 75 percent two years
6 after. There was a lot of negotiation around those
7 reporting provisions and what their requirements were.

8 I also thought that -- okay, that's later
9 on. Five point four on page 14, there are security
10 provisions that were not exactly alike but similar to
11 some of the security provisions in our other
12 agreements. And those required Yahoo to implement
13 secure streaming measures.

14 In 5.6, they agreed to cooperate with us
15 in implementing technology solutions for reporting.
16 This actually was something that was very valuable to
17 us, because we were, with all of our deals, setting up
18 a system whereby you got seamless reporting from the
19 webcaster so that you could easily distribute the
20 money or more easily distribute the money. It was
21 very important, and it's been a very difficult process
22 to try and do. And Yahoo, essentially, agreed to be

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1 a test case for us in the event that, for example, we
2 wanted to test a certain technology that somebody came
3 up with to do that reporting. So they agreed to do
4 that, which was important to us.

5 And I think the rest -- I don't think
6 there's anything else that's worth going over in
7 detail.

8 ARBITRATOR VON KANN: Question: On the
9 exempting of incidental performances and featured
10 music, those are provisions we would not find in the
11 other RIAA agreements?

12 THE WITNESS: That's correct. You could
13 theoretically have incidental uses on Internet-only
14 stations in commercials, although those rights are
15 usually obtained by the company that puts the
16 commercial together.

17 ARBITRATOR VON KANN: Well, if we -- if
18 you don't have those kind of provisions in other
19 agreements, doesn't this effectively amount to a
20 further reduction in the rate in relation to other
21 licensees, because it takes some number of
22 performances that would otherwise be subject to a

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1 royalty and says, "We won't count them for royalty
2 purposes."

3 THE WITNESS: I don't believe so, just
4 because these were mainly directed at the radio
5 retransmission issue, that you have these incidental
6 and featured music on non-music channels. So the
7 featured use, we actually did a calculation so that we
8 came up with a flat fee but that it was consistent
9 with the rates, generally, and I could not begin to do
10 that calculation for you right now. If the Panel
11 wanted, we could try and come up with some additional
12 information for it.

13 The incidental use is the value when we
14 talked through -- remember, they only had -- it was
15 principally on sport stations. For example, they only
16 had about 35 sports stations, so you were -- we
17 actually did this calculation to figure out how much
18 use -- how much were we really giving away here. And
19 the amount was so little and the value of it was so
20 little that technically it's, I guess, a further
21 reduction, but I mean it's minuscule.

22 ARBITRATOR VON KANN: Didn't amount to

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1 much? Okay. Thank you.

2 BY MR. GARRETT:

3 Q All right. Let me ask you to move to the
4 next licensee, which is Spike. Would you just briefly
5 describe Spike Radio?

6 A Yes. Spike launched a syndicated radio
7 service in 2000. They were a division of an
8 Australian company. They had a number of channels of
9 music, and they had agreements with -- I think that
10 they were the webcaster for a presentation that Nike
11 did during the Sydney Olympics and had a couple of
12 other companies like that that they had done some
13 special projects for.

14 They came to us in June of 2000, and they
15 basically sent us a letter saying, "We're awaiting the
16 outcome of the arbitration to determine the licensing
17 fee, but we'd be interested in discussing how we can
18 work together with the RIAA on one particular matter."
19 And it was a specific issue with Nike that just didn't
20 fall under the statutory license, so it ended up going
21 nowhere.

22 But in talking with them on that issue, it

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1 got discussions going with them on a statutory
2 license, so they moved into negotiation mode. And we
3 had discussions with them for a couple of months, in
4 July and August, and I think we sent them a form
5 syndication agreement in July.

6 ARBITRATOR VON KANN: Do you have any form
7 syndication agreement?

8 THE WITNESS: Well, we had developed one
9 right around that time, because there were many more
10 syndication services, and there were certain issues in
11 particular that we had to address that I think if we
12 go through as part of the agreement, it will be
13 easiest to do that.

14 We had a lot of back and forth on the
15 rates. I think on, let's see, August 21 -- I have a
16 note here about that. We had a lot of disagreements
17 about what the appropriate rate should be before we
18 ended up at an appropriate rate, and they told us more
19 than once, "We'll see you at the arbitration if we're
20 not happy with the fee." We ended up signing an
21 agreement in August, late August -- I think it was
22 late August -- yes, August 25. And it's probably

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1 worth looking through that agreement just to explain
2 where we are in syndication, because I think --

3 BY MR. GARRETT:

4 Q Do you know what they proposing initially?

5 A They were proposing, I believe, 0.2 cents
6 and then 0.25 cents initially.

7 Q All right. And you rejected those offers?

8 A We rejected those offers, and, you know,
9 there was a lot of back and forth, as in the e-mail
10 correspondence there. We eventually ended up at the
11 rates that are in the agreement now.

12 Q They were represented by an attorney from
13 Morrison and Forrester; is that right?

14 A Yes.

15 Q All right. Why don't you go to the
16 agreement and just tell us --

17 A Okay.

18 Q It's 76 DR.

19 A Okay. For the initial -- let me start
20 first with some of the syndication language. There
21 were many issues arising surrounding syndication. The
22 statutory license has a definition of what types of

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1 services are covered under its provisions, and there
2 is a specific provision that talks about the service
3 being -- it's probably best for me just to -- it's the
4 definition of eligible, non-subscription transmission,
5 and it says --

6 CHAIRMAN VAN LOON: Can you remind us the
7 cite, please?

8 THE WITNESS: Yes, I'm sorry. It's on
9 page 50 of the purple book, which is 114(j)(6). It's
10 in the definition section of 114. And it talks about,
11 "An eligible non-subscription transmission is a non-
12 interactive, non-subscription digital audio
13 transmission not exempt under Section D.1 that is made
14 as part of a service that provides audio programming
15 consisting, in whole or in part, of performances of
16 sound recordings, including retransmissions of
17 broadcast transmissions."

18 Here's the important language: "If the
19 primary purpose of the service is to provide to the
20 public such audio or other entertainment programming
21 and the primary purpose of the service is not to sell,
22 advertise or promote particular products or services

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1 other than sound recordings, live concerts or other
2 music-related events."

3 So the question that arose with
4 syndicators was -- and the legislative history, I
5 should add, makes a distinction between a music site
6 and something like Ford.com that is in the business of
7 selling cars and playing some background music.
8 Ford.com would not be covered under the statutory
9 license, because it would not be eligible under this
10 definition.

11 What happened with syndication was you
12 have these services, like Spike or WWW, for that
13 matter, that would provide music to third party sites,
14 some of which were not -- the sites alone would not
15 have qualified for this definition. So the question
16 that arose for us was, is this -- does that kind of
17 service, when they're making transmissions through
18 those sites, are those transmissions eligible under
19 the statutory license, because they're being made
20 through a service, a site, essentially, that's not
21 there for the primary purpose of providing audio
22 programming or selling sound recordings. They may be,

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1 you know, syndicating through -- Websound, for
2 example, I think earlier in the proceeding talked
3 about Volkswagen and some of their other -- Pottery
4 Barn or Eddie Bauer that are some of their clients.

5 So the question was, was that eligible or
6 not? We concluded that the better reading of this
7 section was that the -- you looked at the syndication
8 service to determine whether that was the service or
9 not and not the eventual web site.

10 Now, the reason that this is important is
11 that while we concluded that, we also felt that when
12 music is -- and by "we" I mean the Negotiating
13 Committee -- when music is being used to sell other
14 kinds of products on a web site basically to keep
15 people at a Pottery Barn so that they'll buy more
16 things from Pottery Barn, there's an additional value
17 that is part of that transmission. And, therefore, we
18 wanted to have an additional fee paid for
19 transmissions that were of that nature.

20 The second issue with syndication was
21 whether you -- some services like WWW just offered the
22 same channels to every syndicated site. Spike and

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1 some other services wanted to actually create a
2 program, much in the same way AEI might create a
3 background music program for a particular store. So
4 they were creating it for that particular client. We
5 viewed that as having additional value as well.

6 So the license grants that are here
7 include some additional language around syndication,
8 some additional terms around syndication, and the
9 performance fees were greater than 0.4. We, initially
10 -- what the Negotiating Committee felt was appropriate
11 was a 20 percent premium for each of these two things.
12 Instead, for services that wanted an all-in rate, we
13 just gave them, instead of 0.35 to 0.4 it was 0.45
14 which resulted in maybe 30 percent or something. And
15 then you add in the ten percent ephemeral fee, and you
16 get a straight 0.5 rate.

17 So that was the rate that we agreed upon
18 with Spike Radio. They wanted this all-in, to pay
19 this all-in rate for every transmission. In other
20 agreements, what we did was we had different rates for
21 different types of transmissions depending on who it
22 was being syndicated to and whether it was being

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1 created for the client. So that you'll see in some of
2 the other agreements, and I just wanted to explain
3 that.

4 So the rate here was a 0.5 rate, but they
5 did something similar to what we did with Soundbreak.
6 They paid a \$30,000 fee for up to the first ten
7 million performances or February 28, 2001. So they
8 got either six months or ten million performances,
9 whichever came first for \$30,000, and then they paid
10 the per performance rate over and above that.

11 And the other provisions that are probably
12 worth pointing out that we had a lot of discussions
13 over included getting some of the data and
14 listenership information from the syndicated site.
15 And there were best efforts clauses put in for that
16 instead of requiring that they do it in every
17 instance. Spike said, "We're not sure we can get at
18 this data given we're in this syndication arrangement.
19 We'll do everything we can to get it, but we can't
20 necessarily get it." So there was some negotiated
21 language over that. And I think that those are the
22 only additional things at least worth pointing out at

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1 this point.

2 BY MR. GARRETT:

3 Q All right. Your next agreement was with
4 Websound, which was also a syndicator?

5 A Yes. And Websound was very similar, in
6 terms of its business, to Spike. In fact, the
7 negotiations were going on at about the same time.
8 And Websound, Eddie Bauer, Volkswagen, Polo, some of
9 their clients, and they're affiliated with a company
10 called Rock River Communications, which makes branded
11 CDs for some of these companies as well.

12 And their agreement -- let me turn, first,
13 to the discussions we had with them. We had some
14 contact with them in May of 2000 and then picked up
15 with discussions in late July and negotiated around
16 the same time, as I said, with -- as we were
17 negotiating with Spike. So it was in the July/August
18 time period. I'm not sure that there's anything
19 specific to point out in the back and forth. It was
20 the typical back and forth with issues that they had
21 raised that were either some similar, some different
22 from other licensees and red lines with their counsel

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1 as well.

2 And the eventual agreement was very much
3 like the agreement with Spike except that they didn't
4 pay this upfront fee to buy down the initial rate.
5 Instead, we gave them an introductory rate of 0.39
6 cents for the first six months instead of 0.455 cents
7 for the remainder of the period. And we also gave
8 them a break on the ephemeral fee, and I'm looking for
9 that. We gave them the ten seconds for free in 3.11
10 and then they got an introductory rate of five percent
11 on the ephemerals before it went up to the ten
12 percent. But otherwise, the agreement I think is very
13 similar to the Spike Radio agreement. We did give
14 them also an additional two years, through 2003, so
15 a longer term. Okay.

16 Q All right. The Websound agreement is
17 actually at 78 DR?

18 A Yes.

19 Q And you also entered into an agreement
20 with Mood Logic, correct?

21 A Yes. I thought that the Mood Logic
22 agreement was later, but it's before Websound, at

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1 least in terms of the exhibits to my testimony.

2 ARBITRATOR VON KANN: Is Websound still
3 operating?

4 THE WITNESS: Yes.

5 ARBITRATOR VON KANN: And Spike?

6 THE WITNESS: Spike I believe is, but I'm
7 not positive. I'm not positive.

8 ARBITRATOR VON KANN: Okay.

9 BY MR. GARRETT:

10 Q Can you tell us who Mood Logic is?

11 A Yes. At the time we -- Mood Logic is a
12 company that is planning to launch a webcasting
13 business. They have a proprietary technology that has
14 a music database for programming purposes that take
15 into account the mood of a song, for example, in
16 helping people program. So it, I believe, connects
17 the dots between songs based on tempo, mood, things
18 like that that they have as proprietary.

19 At the time that we began speaking with
20 them, they had -- they were a DiMA member and had
21 signed up for the arbitration. And we began our
22 discussions in earnest in early September of 2000. I

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1 was in their neighborhood of San Jose and met with
2 them at that time. And we had one of -- a discussion
3 that went something like this: They were in the
4 arbitration, and they were asking -- said they were
5 interested in sitting down and talking to us to see if
6 there was something that we could do short of them
7 being in the arbitration. And the meeting ended with
8 them to think things over. I discussed with them the
9 kinds of licenses we had been doing, the kinds of
10 structures we had been doing, what we would be open to
11 doing, and they then got back to us sometime later to
12 say that they were interested in moving forward and
13 trying to negotiate something.

14 And that began later that month in
15 September. We had a number of discussions on a number
16 of different issues. They wanted, for example, a --
17 at one point they suggested a cap per user, so no more
18 than a dollar would be paid per user. They would pay
19 on a per performance basis, but when you get to a
20 dollar per person that's all that we would get. And
21 a number of other issues like that.

22 ARBITRATOR VON KANN: What did you say to

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1 somebody like this who said "I'm in the CARP and I'm
2 not particularly inclined to negotiate." What was the
3 pitch to get them to want to negotiate?

4 THE WITNESS: Well, there's only one thing
5 we could offer them which was under the statutory
6 license, so what we tried to pitch to them was our
7 willingness to be flexible and trying to tailor a
8 license that they might find favorable and we had put
9 that up on our website in the FAQ as a possible reason
10 to do an individual deal and that was the main thing.

11 I think on the FAQ we also talked about
12 you'll obtain certainty by negotiating your own rate
13 and we also said that putting your fate in your own
14 hands and not in -- with all due respect, the hands of
15 three Arbitrators, and those kinds -- a lot of the
16 same -- that, in particular, was one of the things
17 that motivated us to want to do the deals, but those
18 were probably the three things that we pitched.

19 ARBITRATOR VON KANN: Okay, thank you.

20 BY MR. GARRETT:

21 Q First tell us what was the rate that you
22 finally agreed to at Moodlogic. It's a little bit

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1 different from the others.

2 A It is a different rate. We ended up at --
3 it was a combination per performance gross revenues
4 and I believe the rates are 15 percent and .25 cents.

5 Q Higher or the lower?

6 A I think it's the greater. Yeah, it's the
7 greater of. There was an introductory rate of 10
8 percent and .2 and then 15 percent and then .25 and
9 the greater of those two.

10 Q Was there any kind of a premium of
11 transmissions were not syndicated predominantly for
12 entertainment services?

13 A Yes. This was one of the agreements where
14 depending on the type of syndication they were doing
15 that license fees would increase by 20 percent.

16 They didn't want an all in rate because
17 they thought they were only going to be doing a
18 certain amount of syndication and a certain amount of
19 syndication that would qualify for the additional
20 premium rate.

21 So instead of buying an all in rate as
22 Websound and Spike Radio did, they agreed, we agreed

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1 on kind of a standard rate and then they would pay a
2 premium for certain performances that were syndicated
3 to non-entertainment sites or that were -- I think it
4 was just the non-entertainment sites. I think they
5 agreed that they would not offer any specially created
6 programming for individual sites, so there was no
7 issue there about a premium.

8 Q Is there an ephemeral royalty?

9 A There's an ephemeral fee that's equal to
10 10 percent of the performance fee.

11 Q Do you have security provisions there?

12 A Yes, we had a security provision as well.
13 That would be 5.3 and 5.4 and we also, in the security
14 provision, had something of a most favored nations
15 vis-a-vis the terms that are established in this
16 proceeding. So if different terms are adopted in this
17 proceeding for security, then those would be
18 substituted for these.

19 This was something that we faced a lot
20 when we discussed the security issue for potential
21 licensees. It was something that was very important
22 to us. But they looked at the statutory license and

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1 said well, I'm not sure that -- there's nothing
2 additional here that -- there's nothing additional
3 here, why should I sign on to this and then if there
4 isn't a term that's adopted that's similar to this in
5 the arbitration, I'm going to be at a disadvantage.
6 So in this instance, we said -- we expect that if
7 we're in an arbitration, we're going to be asking for
8 similar terms. We would hope the fact that people had
9 agreed to them in the market would help us get those
10 terms adopted, but with Moodlogic, we basically said
11 if for some reason they weren't, we gave them an out.

12 And that's I think --

13 ARBITRATOR VON KANN: Nineteen down, 7 to
14 go. Can we take a couple of these together, Mr.
15 Marks?

16 THE WITNESS: Let me just see which ones
17 are coming up next.

18 ARBITRATOR VON KANN: How about SheSings,
19 Cyber Axis, Buzz-Bin, Beem-Me-Up, Kickradio and
20 Cornerband. Is there any one of those that you'd like
21 to discuss in particular?

22 CHAIRMAN VAN LOON: How about SheSings?

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1 THE WITNESS: Sure. I hate to say it. I
2 think we can cut and move maybe through a couple of
3 these quickly, but these last few deals are actually
4 structured differently some of them in significant
5 respects and maybe we can just move through it quickly
6 and discuss what the differences are without slighting
7 them.

8 SheSings is a site that intends to offer
9 webcasting as part of a site dedicated to women and
10 music. And the deal was negotiated principally with
11 the husband of the woman, Ms. McCabe, who was setting
12 up the site. He's a -- he works for FBR, is it
13 Freedman Billings & Ramsey. So not surprisingly, we
14 were led after some discussion to including a capital
15 amount as part of the agreement.

16 There were a number of back and forth, you
17 can see on 9446, this was his initial comments on our
18 draft, several pages long on all aspects of the
19 agreement. That continued back and forth.

20 And at the end of the day, we started in
21 about May, ended up with the agreements in December
22 and it includes a mixture of a gross revenues, capital

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1 amount and per performance agreement. And the per
2 performance, I believe, applies to the syndication and
3 the percentage of revenues and the capital amount
4 applies to the SheSings site itself.

5 ARBITRATOR VON KANN: This is one that was
6 never launched, is that right?

7 THE WITNESS: That's correct.

8 ARBITRATOR GULIN: Moodlogic is still
9 operating?

10 THE WITNESS: Moodlogic is an operating
11 company. It hasn't launched its webcasting service
12 yet, although it has some partnerships, but I'm not
13 sure that through those partnerships they're the ones
14 making the transmission.

15 BY MR. GARRETT:

16 Q What about Cyber Axis? Describe who they
17 are.

18 A Yes. Cyber Axis, like Yahoo, retransmits
19 radio programming. They do it in a little bit of a
20 different way than Yahoo does. Their business is to
21 go to a broadcaster and say let us take your website,
22 retransmit your programming and monetize this for you

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1 and we'll share the revenues that we are able to
2 obtain with you.

3 And they were operating for a while a very
4 popular station in L.A. which I think came down as a
5 result of the AFTRA and AFM's streaming issues and are
6 about to start streaming again at the resolution of
7 those issues.

8 This again is a different agreement. We
9 started talking in January. The deal was done at the
10 end of March. Off the top of my head I can't think of
11 anything specific in the back and forth in that time
12 that this time of the day warrants specific
13 discussion.

14 (Laughter.)

15 So --

16 ARBITRATOR VON KANN: The new test of
17 relevance.

18 THE WITNESS: Yes. So moving to -- let me
19 just quickly go over the agreement because there are
20 some things in there that are very different and I
21 hope I can figure this out.

22 CHAIRMAN VAN LOON: What's the number of

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1 this agreement?

2 THE WITNESS: It is 80DR. Okay, it is
3 essentially a gross revenue deal with a capital amount
4 again as the additional consideration with a flat fee
5 dollar minimum, but the gross revenues are set up
6 differently than in other agreements.

7 BY MR. GARRETT:

8 Q Let me see if I can help you a little bit.
9 In Appendix B to your testimony, there's a summary of
10 the rates and terms there?

11 A Yes, that's helpful. You can see there
12 there's 18 percent of revenues other than on-line and
13 banner ads; 15 percent of e-commerce; 10 to 15 percent
14 for banner ads and then there are conditions on all of
15 those percentages, depending on the amount that's
16 done, the amount of the revenues that each comprises.
17 So there are different payments for the minimums and
18 we also had a calculation for allowing them to pick up
19 a station, a broadcast station and then have a payment
20 for whatever past performance has been made by that
21 station under a calculation and formula in the
22 agreement.

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1 That was based on the fact that a lot of
2 their clients, the broadcast stations that they were
3 talking to wanted to -- when they signed on, know that
4 their past liability was going to be taken care of.

5 Next is --

6 CHAIRMAN VAN LOON: Before you go on from
7 that, this was the first one. SheSings, if I have the
8 timing right was the last one before the Copyright
9 Office came out with its ruling on the broadcasters.

10 THE WITNESS: Right.

11 CHAIRMAN VAN LOON: Did that change the
12 climate? It looks like there was a two to three month
13 interim hiatus before you come to the next one. Did
14 that impact things a lot or was it just getting over
15 the holiday season?

16 THE WITNESS: Oh, in terms of the gap? Is
17 that what you're referring to the gap in the
18 agreements?

19 CHAIRMAN VAN LOON: I mean more
20 substantively, did that change the climate, the
21 parties that were interested?

22 THE WITNESS: The only thing it really

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1 changed would have been dealing with a company like
2 Cyber Axis that was retransmitting radio for most
3 webcasters who are not retransmitting radio. It was
4 neither here nor there.

5 CHAIRMAN VAN LOON: Right, so they're the
6 first ones.

7 THE WITNESS: And you can see that there's
8 no discounted, it's a pretty standard gross revenue
9 rates for their retransmissions as opposed to the
10 Yahoo rates which were done at a time where there was
11 much greater uncertainty.

12 We could probably group a few of these at
13 the end together.

14 MR. GARRETT: I hate to say it, but you've
15 worn even me down.

16 (Laughter.)

17 I really hate to go through any of these
18 quickly because each one of them is important to us in
19 our case, but I understand the hour and I understand
20 the Panel's sentiments and there are a couple other
21 things we wanted to do after this.

22 But let me, we'll pass out the remaining

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1 material, but the one last agreement --

2 CHAIRMAN VAN LOON: Could you agree that
3 anything, any cross examination that comes up will be
4 appropriate, rather than saying it was outside the
5 scope of the direct? It will be virtual reality
6 direct and they can still cross examine.

7 MR. GARRETT: I hadn't thought about that.

8 (Laughter.)

9 No, obviously, they're all fair game for
10 Mr. Steinthal and that's -- it's in the record anyway,
11 so whether I have the witness talk about it or not is
12 not going to be, I'm sure it won't affect Mr.
13 Steinthal anyway.

14 But what I do want to do is just talk a
15 little bit about the MusicMatch agreement because
16 there has been a lot of discussion about that in this
17 proceeding. And then we have a couple of other things
18 that we want to talk about concerning the licensees
19 generally, and the rate proposal and also the business
20 establishment license.

21 ARBITRATOR VON KANN: Do you have an
22 estimate at this point of the completion of your

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1 direct?

2 MR. GARRETT: I would say probably another
3 30 to 40 minutes.

4 ARBITRATOR VON KANN: Okay.

5 BY MR. GARRETT:

6 Q While the paper is being handed out, Mr.
7 Marks, why don't you talk about MusicMatch.

8 A Sure. MusicMatch is a company that has
9 developed a jukebox that is bundled with computers so
10 that when you buy it, you can burn your CDs and listen
11 to music through their jukebox application. I don't
12 have the numbers, but it's one of the more popular
13 jukeboxes and they've been doing that for I think at
14 least since 1999.

15 They got into the webcasting business in
16 I believe November of 2000. They had launched a
17 service that had about 20 to 25 channels and they were
18 at that point a DiMA member and signed up to
19 participate in the arbitration. We had -- actually,
20 could I have the notebook?

21 We had some initial discussions with them
22 back in November and if I can just look at this

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1 quickly to refresh my recollection. Great, thanks.

2 ARBITRATOR VON KANN: You have now almost
3 succeeded in moving all that paper from the anteroom
4 into everybody's hands.

5 THE WITNESS: I believe we now have. We
6 had some discussions in late 2000. I think the
7 discussions on the license agreement started in
8 January of 2000 and we went back and forth on gross
9 revenues. I believe we talked at some point about per
10 performance agreement.

11 ARBITRATOR VON KANN: Did you say they got
12 into discussion in January 2000?

13 THE WITNESS: I'm sorry, January 2001.
14 I'm sorry.

15 And there was some back and forth for a
16 period of three or four months. And we were at the
17 point of trying to come up with a possible flat fee
18 model that might work for them and I think our focus
19 was -- it was right about the time that the direct
20 cases were being filed and were filed and this was one
21 of the instances where it took us a little bit of time
22 to think through this or get back to them and we just

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1 never really got there because we never had the time
2 to do that.

3 And then there was this issue that arose
4 in this proceeding about the personalized service.
5 Now what happened was MusicMatch in May launched a new
6 subscription service that was called Radio MX that
7 included features that we deemed or at least believed
8 to be based on our knowledge of the way it worked,
9 personalized and therefore interactive.

10 And therefore we included MusicMatch in
11 the motion that we filed with the Copyright Office to
12 exclude all that personalized programming from this
13 proceeding. Our principal concern there was that we
14 did not want the legal issue being decided here. We
15 didn't think that this was the appropriate forum to
16 decide that legal issue. We wanted to have that legal
17 issue decided either in the market or settlement
18 discussions or if need be by court.

19 So we had engaged -- before we filed our
20 motion, let's see, when did we file the motion and
21 arbitration? That would have been --

22 BY MR. GARRETT:

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1 Q Would the date May 25th sound about right?

2 A Yes.

3 Q I don't want to suggest an answer to you.

4 MR. STEINTHAL: I can answer that
5 question.

6 (Laughter.)

7 THE WITNESS: I'm trying -- what happened
8 was before we filed that motion, we made an overture
9 to Mr. Steinthal on behalf of his clients who were
10 part of this group to sit down at the table and try
11 and figure out functionality. This was our attempt to
12 avoid dealing, having this issue in this proceeding
13 and possible litigation.

14 So we made that overture to sit down. We
15 had two meetings. One in California and one in New
16 York, earlier in May over the course of probably a two
17 or three week period. And we made some progress. At
18 those meetings, Launch and MTV had representatives
19 there. MusicMatch did not have a representative, but
20 Mr. Steinthal, I think was there as their
21 representative.

22 We made some progress, but weren't able to

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1 reach resolution with those companies and that led us
2 to that May 25th date which I think was the last date
3 to file motions and therefore we felt we had to file
4 it at that time and we also filed the litigation
5 against Launch at that time as well.

6 What happened then was some of that group
7 of seven filed the declaratory judgment action and
8 MusicMatch was included in that group in the following
9 week and then we followed that declaratory judgment
10 action with infringement actions against some of those
11 companies. I think there were a couple that dropped
12 out. Encanta had dropped out. I don't think they
13 were ever part of the declaratory judgment action.
14 They dropped out of the CARP and then Listen, we were
15 able to come to agreement with, a settlement agreement
16 with so that they weren't in the litigation that we
17 filed following up on the declaratory judgment action.

18 At the time, a few days after the
19 declaratory judgment action was filed, before our
20 infringement action was filed I got a call from Bob
21 Ohweiler asking if we could sit down and talk through
22 these issues.

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1 ARBITRATOR VON KANN: Bob who?

2 THE WITNESS: Bob Ohweiler who's from
3 MusicMatch. He's, I believe, Senior Vice President of
4 Business Development, but I could be corrected on
5 that.

6 CHAIRMAN VAN LOON: And this was around
7 when?

8 THE WITNESS: This was -- this would have
9 been the second week of June. And so basically what
10 happened was in the last week of May, the declaratory
11 judgment action was filed. I think that was on a
12 Thursday. I got a call on the following Monday or
13 Tuesday, I think, from Bob or Mr. Ohweiler on that
14 following Monday or Tuesday and then on the Thursday
15 or Friday, I guess it was the Friday we followed up
16 the declaratory judgment action with our suits.

17 In the discussion with Mr. Ohweiler
18 earlier that week, he said that he was going to be
19 coming the following week to the East Coast, could we
20 sit down -- he was coming with his CEO, Dennis Mudd,
21 and he wanted to know whether we could sit down and
22 just talk. And I said absolutely and we had that

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1 meeting in Washington where we discussed -- they gave
2 us a presentation on their functionality, what it was
3 all about. We told them what our concerns were, why
4 we thought it was personalized and but we told them we
5 were willing to work something out with them, just
6 like we had worked something out with Listen. And
7 they thought that was a good thing.

8 They indicated some flexibility in
9 changing their service to get to somewhere where we
10 could have an agreement. The issue of a license
11 agreement also came up later in that meeting and we
12 told them that we would very much still like to
13 negotiate a license. We realized that we had never
14 gotten back to them on the flat feet proposal, but we
15 thought we were moving constructively in the
16 direction, hopefully towards something, the several
17 months before the direct cases were filed or right
18 around the time the direct cases were filed.

19 So what happened at that point was they
20 left the meeting and said let us get back to you about
21 where we think we can go. And the following Monday,
22 I guess it was, which now would have been the third

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1 week of June, they got back to us and said we'd really
2 like to get going on both of these issues. Let's just
3 figure this out. Let's work on this functionality and
4 let's see if at the same time we can get a license
5 agreement done.

6 And basically for the course of that next
7 week, I happened to be out in Los Angeles for meetings
8 regarding this proceeding and I had a number of phone
9 calls back and forth early morning, late night,
10 etcetera, trying to figure out these issues with Mr.
11 Ohweiler and his staff. We eventually got to a place
12 where we had a term sheet that included not only the
13 functionality issues, but a license agreement as well.
14 And we -- I discussed it with my members. I sent them
15 an e-mail over that weekend.

16 This was one of those instances where
17 things were happening so quickly that we didn't have
18 the regular back and forth or phone call with the
19 companies and I was out of town, that we would
20 normally have and I presented this deal in its
21 entirety, essentially to them, at least what we had
22 negotiated on the term sheet. And we had a discussion

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1 with my companies the next week. There were some
2 additional comments and then we were able to move
3 forward with signing the term sheet and then
4 eventually negotiating the agreement.

5 So in terms of process, that's how we got
6 from there to here. And the agreement was eventually
7 signed. At that point, there were drafts flying back
8 and forth for a couple of weeks and it was eventually
9 signed I think some time in July, I guess. I can look
10 at the agreement. July 11th is the execution date.

11 BY MR. GARRETT:

12 Q Can you just briefly describe the
13 highlights of that agreement?

14 A Sure. In terms of the rate, first of all,
15 this covered both a non-subscription and a
16 subscription service. They had both.

17 And it was a gross revenues deal and the
18 gross revenue amount including the ephemeral was 11.5
19 percent. But there were no ad deductions. So if you
20 took the 15 and viewed that as 10.5, once you took ad
21 deductions and added 10 percent of 10.5, you get to
22 11.55 with the ephemeral and this deal was at 11.5

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1 percent, but in addition to that 11.5 percent, we have
2 a nonrefundable minimum of \$350,000, \$100,000 of which
3 they paid up front.

4 CHAIRMAN VAN LOON: You said \$350,000?

5 THE WITNESS: Yes. I mean there are a
6 number of things we could point out in the agreements.
7 I'm not sure, you know, suffice it to say that there
8 were a number of things that were negotiated that may
9 look a little bit different than our standard license
10 agreement.

11 The one thing that is worth pointing out
12 is the rate adjustment mechanism and the rate
13 adjustment mechanism which is Section 3.7 on page 10
14 of the agreement, and I think that that's Exhibit 115.

15 It worked as follows: if the rate from
16 this proceeding is either 2.5 percent or more below,
17 or 2.5 percent or more above, then there is --

18 CHAIRMAN VAN LOON: Above or below what?

19 THE WITNESS: The 11.5 percent.

20 CHAIRMAN VAN LOON: Oh.

21 THE WITNESS: So it were 9 or below or 14
22 or above, then there would be an adjustment so that

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1 one half of the difference between the 11.5 and
2 whatever that rate was would be the new rate. So, for
3 example, if it were 11.5 and 14, you would take one
4 half of that 2.5 percent difference and the new rate
5 would be 12.75, I guess. And the same thing on the
6 other end. So it was consistent with some of the
7 thoughts we had had earlier about doing these kinds of
8 rate adjustment mechanisms and it was just in the past
9 there was never included in any agreement and this
10 agreement was.

11 BY MR. GARRETT:

12 Q Are there any other agreements that have
13 any kind of an adjustment like this?

14 A No.

15 ARBITRATOR GULIN: Can I ask you to go
16 over one more time, please, the rate was 11.5 percent
17 of gross revenues, but there was no ad deduction you
18 said. Then there was something else that it didn't
19 have that brought it to some equivalent --

20 THE WITNESS: I was just comparing. If
21 you have our 15 percent deal and if you look at that
22 as with the deductions as 10.5 percent and then the

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1 ephemeral fee is 10 percent of the 10.5, you add that
2 in, it's 11.55 percent. So this deal was at 11.5
3 percent, but so it was consistent with those rates
4 although we got the additional consideration of a very
5 large minimum fee. So I would -- we viewed that as
6 buying down the rate a little bit in some respects,
7 but that's really just in our own minds.

8 ARBITRATOR VON KANN: You are not going
9 give Mr. Steinthal credit for beating you down
10 somewhat from those negotiations?

11 MR. STEINTHAL: I was not involved in
12 that.

13 ARBITRATOR VON KANN: Not involved in
14 those negotiations. Okay.

15 THE WITNESS: Functionality would be the
16 only other thing to go over. I don't know whether
17 I'll leave it to everybody else to figure out whether
18 that's worth doing at this point.

19 BY MR. GARRETT:

20 Q Let me move on to some other things here.

21 MR. STEINTHAL: You get to do that with
22 me.

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1 THE WITNESS: I figured we would.

2 BY MR. GARRETT:

3 Q Let me ask you to do this, Mr. Marks, can
4 you just identify up on the board there behind you the
5 licensees -- just erase that.

6 MR. STEINTHAL: If we're going to go into
7 something different, can we have the proverbial 90 to
8 120 second break?

9 CHAIRMAN VAN LOON: Sure. Why don't we
10 make it seven whole minutes and come back at 20 past.

11 MR. STEINTHAL: Thank you. Is there a
12 sense of how long we'll be going today?

13 CHAIRMAN VAN LOON: The first part of that
14 would be Mr. Garrett. How much longer you expect to
15 go?

16 MR. GARRETT: I think probably another
17 half hour or so.

18 CHAIRMAN VAN LOON: Another half hour.
19 And then Mr. Steintal?

20 (Off the record.)

21 CHAIRMAN VAN LOON: As much as I
22 personally would like to go late this evening, I've

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1 been overruled by my colleagues. So our thought is as
2 follows, given the amount of planning and the
3 reassurances about schedule last week, it is very
4 difficult, but not impossible for us to extend over
5 into Thursday. We do agree that we have certainly all
6 of Wednesday afternoon and if we have all of Tuesday
7 and all of Wednesday afternoon and perhaps part of
8 Wednesday morning, if the artists don't take up the
9 whole morning, then we have the full day and a half
10 for cross examination.

11 We are prepared and inclined to sit late
12 both Tuesday night and if necessary, Wednesday night,
13 depending on the estimates that you give us with a
14 goal of completing things by the close of the day on
15 Wednesday with the hope that that would be earlier
16 rather than later, but the full willingness to
17 continue later. We do agree with and want to keep to
18 the schedule of having the people who have traveled on
19 Wednesday morning to be able to be on and be the first
20 witnesses on Wednesday. Similarly, we would like --
21 I remember that some of the counsel with regard to 115
22 are not available on Thursday, so we would want to

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1 continue to have that discussion on -- on 112, yes.
2 We want to continue to have that on Wednesday, but
3 we're thinking of very clear time limits, perhaps 15
4 minutes to a side or something like that, not to
5 greatly expand or take up the time. And perhaps with
6 the thought that given the hour and what's yet to
7 come, it might be helpful all the way around to break
8 after the end of direct, give time for preparation and
9 thinking about how you want to approach this. But Mr.
10 Steinthal, we would certainly yield to your
11 preferences on that.

12 The one other thing I think we should say
13 is given our experience now with understanding the
14 bulk of the materials and upon reflection and the
15 extent to which they were or were not really used in
16 direct, clearly Mr. Steinthal, you will have an
17 opportunity to use any of these documents or any of
18 the other ones in any way you see fit and have planned
19 for in your cross and our inclination is to think that
20 under the doctrine of completion or whatever the
21 appropriate time to deal with what else, if anything,
22 might come in would be as part of the rebuttal phase,

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1 but we're not wedded into that. We're probably
2 wanting to wait and see to what extent this becomes an
3 issue, in fact, in the cross examination.

4 So maybe the first question with the idea
5 in mind that we're prepared to take as long on Tuesday
6 and Wednesday as we need and assuming something after
7 7 for the end of direct, do you have a preference, Mr.
8 Steinthal about starting for an hour or so tonight or
9 starting fresh in the morning?

10 MR. STEINTHAL: My preference would be to
11 frankly start fresh in the morning, in part, well, for
12 a number of reasons including the stack because
13 although Mr. Garrett suggests that we have the
14 documents which we did, we now know that the
15 likelihood is they're going to, at some point, move
16 all that into evidence and therefore there may be some
17 documents that I did not intend to examine Mr. Marks
18 on that I will examine Mr. Marks on. So there's a
19 little bit of that that I've got now more homework to
20 do than I expected to have. And for that reason I'd
21 like to start fresh in the morning.

22 I'll do my best. Inevitably in cross,

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1 there's a certain degree to which you don't know how
2 long it's going to take because you don't know how
3 much or what kind of responses you're going to get and
4 I know that Mr. Kirby has some cross. I had hoped we
5 would get it done in a day and a half and I still hope
6 we can get it done in a day and a half in light of the
7 importance that Mr. Marks' testimony has to the RIAA's
8 case, I hope that if despite our best efforts, we
9 can't seem to finish on Wednesday afternoon, there
10 would be some ability to carry over to Thursday. I
11 don't want to do that either. I think all of us made
12 plans to be back where we come from on Thursday
13 evening at the latest and if we can do it and finish
14 Wednesday, great, but I just feel given the amount of
15 time, effort and everything that's gone into this and
16 the importance of Mr. Marks' presentation to the RIAA
17 case that we shouldn't have that sort of in our face
18 as a deadline.

19 CHAIRMAN VAN LOON: I can't see whether
20 Ms. Leary is still here. I know she was earlier. Are
21 you all anticipating that there will be two cross
22 examiners, rather than three or four?

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1 MR. STEINTHAL: There will be three, I
2 think. Mr. Kirby will have some and Ms. Leary will
3 have some. There may be four, depending on --

4 MS. LEARY: I was going to say our cross
5 will depend on what Mr. Garrett intends to cover.

6 CHAIRMAN VAN LOON: There's Ms. Leary. We
7 were just inquiring whether you anticipated that you
8 would have some cross?

9 MS. LEARY: I'll have some limited cross
10 examination.

11 (Pause.)

12 CHAIRMAN VAN LOON: Okay. A further
13 clarification. It may be appropriate with some of
14 these documents being used in cross examination to
15 consider some completion of the record as we go rather
16 than putting it off until later, but again, we want to
17 feel our way depending on how things actually go.

18 ARBITRATOR VON KANN: It may be, Mr.
19 Garrett, overnight you can think a little bit about
20 whether really at the end of the day you do think we
21 need all of that in the record. I mean the Panel sort
22 of takes judicial notice of the fact that there was a

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1 lot of paper that went into these agreements, many
2 drafts back and forth and many e-mails. Whether we
3 actually need to have all 10 redline versions back and
4 forth, I think, is a question you need to think about
5 because obviously it makes a much greater record, a
6 lot of work for all of us to go through it. We
7 certainly see there was a lot of -- there was a huge
8 background behind these and we have that point.

9 CHAIRMAN VAN LOON: So let us resume
10 direct examination of Mr. Marks.

11 MR. GARRETT: The only thing I wanted to
12 add to all that is that we obviously have no problem
13 in having Mr. Marks come back on Thursday, if that's
14 the Panel's wish. He'll spend all day here on
15 Thursday, if that's what they need him to do.

16 CHAIRMAN VAN LOON: We need him to not
17 spend all day here.

18 (Laughter.)

19 But we appreciate the offer. Let's
20 resume.

21 BY MR. GARRETT:

22 Q All right, Mr. Marks, you've gone through

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1 each of the 26 licensees here. Could you just
2 identify in a summary fashion which of the 26 are
3 operational and which of the 26 have not yet launched
4 and which of the 26 have launched, but are no longer
5 in business?

6 A This list right here starting with
7 MusicMusicMusic, TableMusic, RadioFreeWorld,
8 SpatialAudio, MulticastTechnology, Cypertainment,
9 Yahoo, Slam, Websound, Cyber Axis, Beem-Me-Up,
10 Cornerband and MusicMatch are all operating.

11 This group of six are services that plan
12 to launch or relaunch: Ijockey, JamRadio is in the
13 relaunch category. Gallamusica, Moodlogic, SheSings
14 and CableRadio.

15 And these seven are out of business:
16 VisualDyanmics, On-Air.com -- or been acquired. On-
17 Air.com, E-Nashville, I believe that Spike Radio is
18 now out of business, but we'll check that. FansEdge,
19 SoundBreak and Buzz-Bin.

20 Q Now the 26 licensees have been referred to
21 in this proceeding as Yahoo and ChumpChange, do you
22 recall that?

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1 A Yes.

2 Q Do you think that's a fair
3 characterization of the 26 licensees?

4 A No. I think it's a very unfair
5 characterization of them. I think that each of these
6 businesses, each person that we sat down across the
7 table from are intelligent, creative, entrepreneurs,
8 trying to build a business. And some of them have
9 more money to start than others might have, but
10 they're all essentially trying to do the same thing
11 which is to aggregate audience and therefore revenues
12 based on providing music subject to the DMCA statutory
13 license.

14 Q You know how their different business
15 models compare generally to the webcasting business as
16 well as to the licensees that -- I'm sorry, as to the
17 webcasters who have appeared on the other side in this
18 proceeding?

19 A Well, I think if you look at our licensees
20 they are fairly representative of the marketplace that
21 I described initially, at least of the operational and
22 other webcasters. They're all, as I said, in the

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1 business of providing sound recordings pursuant to the
2 statutory license. They're all in the business of
3 doing so in order to aggregate an audience, attract an
4 audience and therefore have revenues and build a
5 business. Some are operational. Others are not
6 operational. Some have yet to launch. Just like in
7 the larger community, webcasters will be to launch and
8 some have gone out of business just like in the larger
9 community, many have gone out of business. I think
10 there are about double this amount that had signed up
11 for the arbitration initially that are out of
12 business. Some are big and some are small and some
13 are medium. We've been referring to three larger
14 players. There may be one additional player,
15 Microsoft that's out there that would now fall into
16 that category, who's now webcasting, but we have Yahoo
17 here and we have some --

18 CHAIRMAN VAN LOON: I guess your direct is
19 over. No, this happens every night at this time.
20 Some automatic system.

21 THE WITNESS: Some are small companies.
22 Most frankly, are not household names that anybody who

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1 isn't intimately familiar with the market would have
2 ever heard of other than maybe Yahoo or somebody like
3 an AOL or a Viacom.

4 Some of our licensees were once in the
5 arbitration, Moodlogic, Yahoo and MusicMatch. So I
6 think our licensees are a good cross section of the
7 marketplace, generally.

8 BY MR. GARRETT:

9 Q How would you compare them to some of the
10 -- that is compare some of the licensees to the
11 webcasters on the other side in this proceeding?

12 A Well, there's some similarities. You
13 have, for example, RadioAmp is a syndicator. WebSound
14 and SpikeRadio and On-Air were syndicators. Live365
15 aggregates individual broadcasters. That's what
16 SpatialAudio does. So I think there are similarities
17 in terms of business models. And again, at the end of
18 the day, all of these companies are in the business of
19 trying to offer at least in part DMCA compliant music
20 and build a business in that way.

21 Q How about in terms of length of time that
22 they have been in this business?

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1 A Yeah, I think that MusicMusicMusic has
2 been in the business longer than everybody on that
3 side but maybe NetRadio and Spinner's predecessor the
4 DJ.com. There may have been a version of
5 RadioSonicNet that looked much, much different than it
6 does today that was up around that time too. Then
7 there are others who have been in business a little
8 bit since 1999, later in 1999 or early 2000 and some
9 that have launched more recently.

10 Q How about in terms of technology that they
11 use?

12 A Technology in terms of offering streaming?

13 Q Well, in terms of the players or the bit
14 rates and that sort of thing?

15 A Yeah, I think that -- well, first of all,
16 we've seen all the screen shots of a lot of these
17 different companies and without taking anything away
18 from any of them, they have a general format that
19 looks about the same. Each of them has something that
20 differentiates them and they think will differentiate
21 them in the market in terms of building a successful
22 business, but they generally offer stream music in

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1 similar formats, RealAudio, Microsoft, MediaPlayer.
2 Some of them have MP3 streaming. There's one or two
3 over there and one or two over of our licensees. And
4 the bit rates are generally the same too, 20 KVPS, 32,
5 etcetera.

6 Q For the 12 that appeared on the other side
7 in this proceeding, which of them are DiMA members?

8 A I think, I believe that every one is a
9 DiMA member. I'm not sure about Comedy Central or
10 BET, whether they DiMA members separately from MTV or
11 if they're all owned by the same company.

12 Q Did you ever have any discussions with
13 Comedy Central concerning rates and terms under
14 Sections 112 and 114?

15 A No.

16 Q How about BET.com, any discussions with
17 them concerning rates and terms?

18 A No.

19 Q How about RadioAmp?

20 A No.

21 Q Echo?

22 A No.

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1 Q MyPlay?

2 A No. MyPlay, do you want me to --

3 Q Any discussions with them actually
4 concerning rates and terms?

5 A No.

6 Q Now with respect to NetRadio, you did
7 travel out to Minnesota to meet with them, did you
8 not?

9 A Yes. On two occasions. One was before
10 the DMCA was passed and then the following spring,
11 spring of 1999.

12 Q And when you met with them in the spring
13 of 1999, did you put any number on the table with
14 them?

15 A We had discussions. At that time, we were
16 exploring with them whether they would be interested
17 in having individual negotiations separate from DiMA
18 and we had discussions with them regarding certain
19 rate structures, gross revenues, principally we didn't
20 make any formal offer. I believe the 15 percent
21 number was something that did come up at the meeting,
22 but there was no formal offer.

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1 Q What happened after that meeting?

2 A What happened after the meeting, we were
3 waiting for them to respond to us about whether they'd
4 be interested in negotiating and in about --

5 Q What were they doing during that period?

6 A Well, they were participating as part of
7 the DiMA negotiations. Those broke off in June as
8 we've discussed and I think in either late August or
9 some time in September, I contacted Dave Witzig who
10 was my main contact at NetRadio for these purposes and
11 I said are you -- I'm just following up. Are you
12 still interested or are you interested and he sent me
13 back a reply saying that they had decided to go to the
14 arbitration.

15 MR. STEINTHAL: In light of the hour,
16 especially, since none of this is in the direct
17 testimony, I'm wondering why if we didn't get
18 documents from the other side about their discussions
19 with companies that didn't do deals with them, that
20 we're now going to have direct testimony about, about
21 this issue?

22 MR. GARRETT: Most of the points that

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1 we're eliciting here are points that respond to things
2 that Mr. Steinthal had brought out during his direct
3 examination of his witnesses. That information also
4 was not in the record or in their direct case here,
5 but I will acknowledge that this is not in Mr. Marks'
6 testimony. It is responsive to other things that have
7 already been brought out in this proceeding and in
8 many cases by Mr. Steinthal himself as part of direct
9 examination.

10 CHAIRMAN VAN LOON: How many more
11 questions did you anticipate in this vein?

12 MR. GARRETT: One with respect to each of
13 the witnesses who testified on the other side here, so
14 it's Live 365, Listen, XACT, Spinner and SonicNet.

15 ARBITRATOR VON KANN: Is the gist of it
16 whether there were any discussions and if there were
17 a brief synopsis of what that was or wasn't, as we
18 just heard in that one case?

19 MR. GARRETT: That's exactly what we've
20 done here. I think that with respect to AOL and
21 Spinner, the answer is a little bit longer, but it's
22 directly responsive to things that had been raised in

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1 Mr. Steinthal's direct examination of his witnesses.

2 CHAIRMAN VAN LOON: We'll allow it.

3 Please continue.

4 BY MR. GARRETT:

5 Q With Radiowave, did you ever put a number
6 on the table?

7 A Yes. We had some discussions with
8 Radiowave around the time of August, 2000.

9 Q Did you ever receive any counter offer
10 from them?

11 A No.

12 Q How about Live 365? Did you have
13 discussions with them concerning rates and terms under
14 Section 112 and 114?

15 A We had some limited discussions with them
16 where we talked about structure and agreements. We
17 sent them a couple of draft agreements in fall of
18 1999.

19 Q Did they ever make any counter offers to
20 you?

21 A No.

22 Q How about with respect to Listen? You've

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1 had a number of discussions with them concerning
2 interactivity issue, right?

3 A Yes. Well, what happened with Listen was
4 that --

5 ARBITRATOR VON KANN: Wait a minute, you
6 just answered it. Let's see what the next one is.

7 THE WITNESS: Sorry.

8 BY MR. GARRETT:

9 Q What happened with Listen?
10 (Laughter.)

11 After those discussions, interactivity,
12 they modified their service?

13 A The answer is no. We had discussions with
14 them last fall. There was no modification of the
15 service at that time. They were then part of the
16 seven companies that were at issue in this proceeding
17 in terms of the personalized services and after the
18 declaratory judgment action was filed, we had
19 discussions with them to modify their system in a way
20 that resolved that dispute.

21 Q Have you ever had any discussions with
22 them concerning rates and terms for a statutory

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1 license?

2 A No. We had an initial meeting where we
3 talked very generally about possible kinds of
4 structures, but we never ended up negotiating.

5 Q Now XACT has a service that you consider
6 to be interactive, is that right?

7 A Yes.

8 Q Have there been any offers back and forth
9 between you and XACT?

10 A No, we never had any discussions with
11 them.

12 Q Have they made an offer to you?

13 A They made a proposal, very recently, maybe
14 six weeks ago regarding both the -- it was a proposal
15 on both a license fee and a change in functionality,
16 I believe.

17 Q Have you ever responded to that?

18 A We have not yet.

19 Q And why is that?

20 A It's just been a matter -- well, two
21 reasons. First reason was that when we looked at
22 their proposal and looked at the proposed

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1 functionality, it was something that we thought was
2 still clearly interactive and therefore we couldn't
3 negotiate with them. We received a call last week
4 from one of their representatives to sit down and
5 negotiate and we haven't yet -- we responded to them
6 on a procedural issue about getting clearance from
7 their counsel so that we could sit down with them. So
8 no discussions have occurred.

9 Q All right, with respect to AOL and
10 Spinner, you're aware that Mr. McIntyre from Spinner
11 testified in these proceedings about Spinner's
12 negotiations with RIAA?

13 A Yes.

14 Q And did you review that testimony?

15 A Yes.

16 Q Do you believe that his testimony is
17 accuracy?

18 A I think that it is -- the only thing that
19 I would add or point out as --

20 Q Do you generally think it's accurate?

21 A I generally think it's accurate, yes. I
22 think that the one point that I would disagree with is

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1 that I think he used the term that we've been in
2 discussions for a long time and we approached AOL in
3 the fall of 1999 and they told us, we had an initial
4 meeting and then at a second meeting they told us at
5 the very beginning of the meeting that they thought
6 that arbitration was their best course. We had no
7 discussion or contact with them for a year or more and
8 then we tried to engage, there was a new team in place
9 at AOL. Last fall, we tried to engage them and we
10 only began having substantive discussions in late May
11 or June of this year. So the only discussions we've
12 really had with them on rates, specifically, have been
13 after the filing of the direct cases here and have
14 been recently.

15 But I would agree with Mr. McIntyre that
16 we've had productive discussions since that time.

17 Q And finally with respect to SonicNet,
18 you've had discussions with them concerning the
19 statutory licensing rates?

20 A Yes.

21 Q And who did you have discussions with at
22 SonicNet?

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1 A Well, we had discussions in 1999 with them
2 and I was principally speaking at that time with Cindi
3 Charles, who's an attorney; Sabrina Silverberg, who is
4 another attorney; and David Sussman was involved in
5 some of those discussions and he's the general
6 counsel. I am not sure. They have MTV networks and
7 MTVi and I'm not sure who falls into which category.

8 Q Have you ever had discussions with Mr.
9 Porteus?

10 A No.

11 Q Have you reviewed Mr. Porteus' testimony
12 in this proceeding concerning negotiations?

13 A Yes, I have.

14 Q Do you find that testimony characterizes
15 the negotiations?

16 A Absolutely not.

17 Q In what respects do you think it was
18 inaccurate?

19 A We had very serious and meaningful
20 discussions with MTV/RadioSonicNet in the fall of
21 1999. We came very close to a deal to the point where
22 Cindi Charles at one point said all we have to do is

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1 figure out the final number. It was just a matter of
2 meeting in the middle. And 10 days later, I had a
3 discussion with Cindi Charles where she told me that
4 they had made a decision not to go forward because
5 they thought it would hurt DiMA's efforts in the
6 arbitration and that they were afraid of being seen as
7 a pariah and she referred to MusicMusicMusic as a
8 pariah in the webcast industry.

9 Q Have you had discussions more recently
10 with them?

11 A We had some renewed discussions with them
12 early this year? We had some productive discussions.
13 We again came close to -- I would say we came fairly
14 close to an agreement and we just weren't able to get
15 the last few issues done which were obviously
16 important enough to make it such that we didn't have
17 a deal.

18 Q On page 31 of your testimony you talk
19 about the business establishment royalty. Just very
20 briefly summarize your testimony on that subject?

21 A Sure.

22 Q Yes, this is with regard to the part of

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1 the Section 112 ephemeral statutory license that
2 relates to business establishment music services or
3 background music services and we have proposed a rate
4 of 10 percent of gross revenues based on discussions
5 with our members regarding their fairly extensive
6 history in dealing with a number of these companies in
7 their traditional business of offering background
8 music to businesses.

9 Q Do you remember coming to any agreements
10 with the different background music services?

11 A Yes.

12 Q And the royalty you're proposing here is
13 based upon the agreements that they have negotiated
14 with the individual record company members over the
15 years?

16 A Yes, that is right.

17 Q Finally, I'd like you to just turn for a
18 moment to the proposed rates and terms of RIAA in this
19 proceeding?

20 A Yes.

21 Q Could you briefly describe the proposed
22 webcaster performance royalties?

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1 A It is in 1A here and is an option of .4
2 cents per performance.

3 CHAIRMAN VAN LOON: Let me just grab my
4 volume. It will take 10 seconds. I'd like to follow
5 you.

6 (Pause.)

7 THE WITNESS: Point 4 cents per
8 performance along the lines that we discussed earlier
9 in going over our per performance deals or 15 percent
10 of gross revenues.

11 And as I said, it's the option of the
12 webcaster to choose which one they prefer, provided
13 that they only are able to make that choice once a
14 year.

15 BY MR. GARRETT:

16 Q And on the .4, there's also a long song
17 surcharge that you described earlier?

18 A Yes, I'm sorry. That's the payment for
19 each additional minute above 5 minutes.

20 Q Okay, and then for the syndicators, it's
21 a different rate?

22 A For syndicators the rate is .5 cents.

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1 That is the all in rate that we discussed earlier with
2 regard to syndication services that make performances
3 through nonentertainment, third party sites and also
4 create programming for individual clients. So we've
5 proposed an all in rate to allow an syndicator to do
6 all of those things and pay that rate per performance
7 and there's the fraction above 5 minutes as well.

8 Q All right. On the next page, 1C, you talk
9 about a minimum fee of \$5,000. Can you just explain
10 that?

11 A The statute includes a minimum fee and
12 that was something that we pressed hard for as part of
13 the DMCA. It was important to us. The minimum fee
14 that we've proposed is \$5,000 per service, except for
15 companies that choose the gross revenue option, it's
16 \$5,000 per \$100,000 of operating expenses, so it's in
17 essence a 5 percent of operating expenses minimum.

18 Q A minimum fee has been referred to by some
19 in this proceeding here as simply a way to covering
20 the cost of administering this statutory license. Is
21 that how you see the minimum fee?

22 A I think it's more than that. I think it's

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1 also to ensure that the value of the music is provided
2 to the sound recording copyright owner.

3 Q When we refer to costs, what are the costs
4 that you incur?

5 A Well, it's significant costs. There are
6 costs of licensing, so for example, the efforts that
7 we undertake in negotiations, whether they would have
8 been with DiMA or individual webcasters and we
9 certainly have spent a lot more money in that regard,
10 given that we have been negotiating with individual
11 companies. In some ways, we've been deprived of the
12 benefits of the statutory license where you are able
13 to have that efficiency of sitting down industry to
14 industry. So that's been a significant cost. There's
15 the costs of collecting the money and distributing the
16 money. We talked earlier about SoundExchange which
17 we've just formed. There have been millions of
18 dollars spent in just getting SoundExchange off the
19 ground and --

20 Q What does SoundExchange have to do with
21 it?

22 A SoundExchange has to -- there's a number

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1 of things and I might not be the best person to answer
2 this, but they have built a staff, basically from zero
3 to handle all of the reports and all of the payments
4 and then take those payments and distribute them.
5 They had to develop software and computer programs to
6 do that. They had to put together databases of all of
7 the sound recordings by getting that information
8 essentially downloading it from sound recording
9 copyright owners and record companies do not have the
10 best systems in place to be able to do that in a
11 seamless way. So every different sound recording
12 copyright owner may have a different system, so you've
13 got to work with each one in getting that information.
14 It's not easy and then there are just the cost of
15 actually distributing the money. You have to find the
16 copyright owners. SoundExchange has also taken on
17 direct payment to artists. So we have to find every
18 single artist that is due money and track them down,
19 get information from them, tax, I.D. information in
20 order to be able to send them a check. It's extremely
21 time consuming and costly expense.

22 Q What about are there any costs associated

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1 with ensuring compliance with the statutory license?

2 A Yes, I was going to say compliance is the
3 last -- is the other component I was thinking of and
4 those go to all the enforcement efforts. I think that
5 it's been apparent in this proceeding that there are
6 -- it is up to us as a representative of sound
7 recording copyright owners to ensure compliance. That
8 might be with our licensees. Certainly with -- I mean
9 many of the companies on this side here we've had --
10 there have been compliance issues with in addition to
11 a couple of our licensees, but Live365, I don't mean
12 to pick on them, but we had -- we noticed that they
13 had over 200 artists only channels at one point and we
14 notified them of that and they took the position that
15 well, we're just going to -- you notify us and we'll
16 take it down and that's not the way we thought that
17 their legal obligation went, but even assuming it was,
18 they were essentially putting the burden on us to
19 monitor their 30,000 stations, some of which just said
20 the Beatles all the time, to do that. Now they have
21 since put in other measures and I commend them for
22 doing that, but that was only after we had six months

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1 after the initial time we talked to them, sent them a
2 letter telling them, demanding that they stop that.
3 So webcasters look to us to do this compliance. We
4 get inquiries from licensees. We get inquiries --
5 Listen.com, for example, when we had the issue with
6 them last fall, in the midst of that issue, I got an
7 e-mail from Sean Ryan who was the President or CEO and
8 he said what do you think of iNoise which was a new
9 streaming peer-to-peer service that was coming up. It
10 was essentially a streaming napster. And I said we've
11 just become aware of it. We're looking into it. And
12 his response was it's hard for me to motivate my staff
13 to deal with the compliance issues you're raising when
14 there are all these other people out there doing these
15 things. So we get inquiries and complaints all the
16 time and we feel that we have to, even more so now
17 that we have a number of licensees, have to ensure
18 that there's a fair playing field. DiMA doesn't do
19 that, other webcasters don't do that. All those
20 compliance efforts fall on us.

21 Q Very briefly, the ephemeral royalty is
22 this 10 percent of the performance royalty that you

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1 talked about before?

2 A Yes.

3 Q And the business establishment ephemeral
4 royalty is proposed at 10 percent of the gross
5 revenues, correct?

6 A Yes.

7 Q And then finally, you talked about Section
8 112 and 114, terms and a number of those terms are the
9 same ones that are currently in the --

10 A In the regulations governing the cable and
11 satellite subscription music services.

12 Q And you also propose interest. Why is
13 that?

14 A The reason is that complying with the
15 statutory license merely requires filing a notice and
16 then you can use the sound recordings until a rate is
17 set and some people that's more than three years. It
18 would otherwise be an interest-free loan for the very
19 content upon which they're building their business.

20 MR. GARRETT: I have no further questions.

21 Thank you.

22 ARBITRATOR VON KANN: Has a nice ring to

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1 it.

2 (Laughter.)

3 ARBITRATOR GULIN: Let me ask you one
4 quick question.

5 THE WITNESS: Yes.

6 ARBITRATOR GULIN: Under administrative
7 costs, one of the costs you talked about was
8 distribution costs?

9 THE WITNESS: Yes.

10 ARBITRATOR GULIN: Aren't you though, in
11 your terms, don't the terms that you're proposing
12 provide that fees will be deducted to cover those
13 costs before distributed?

14 THE WITNESS: Yes, some of those fees will
15 be deducted, but one thing that should be understood
16 is that the money that is going into putting together
17 just the mechanism for doing the distribution is all
18 essentially being fronted by the major recording
19 companies. So the millions of dollars that I
20 referenced are being fronted by all of the companies
21 to do that.

22 Eventually, there will be an

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1 administrative fee, but they don't expect to recoup a
2 lot of the costs that they've invested initially.

3 ARBITRATOR GULIN: Okay, so you're not
4 asking as part of that administrative fee, you're not
5 asking for the recoupment of the process of setting up
6 the SoundExchange?

7 THE WITNESS: The administrative fee that
8 SoundExchange will be deducting will not necessarily
9 cover all of those costs and certainly wouldn't cover
10 the interest. The other thing about SoundExchange is
11 that right now it is benefitting from, for example, my
12 time, my time is not charged against them and there
13 are others, our entire IS Department is the same way,
14 so there are benefits that are accruing that won't be
15 recovered.

16 ARBITRATOR GULIN: Thank you.

17 ARBITRATOR VON KANN: One question. On
18 these licensing negotiations, I take it you're
19 referring here to time and effort and so forth that
20 RIAA put in to negotiating the 26 agreements?

21 THE WITNESS: Right. And outside counsel
22 fees.

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1 ARBITRATOR VON KANN: And outside counsel
2 fees. But the folks on the other side had outside
3 counsel fees and costs, I guess. Morris & Foster
4 doesn't come cheap either, I assume. So is there
5 going to be an offsetting deduction from them if it
6 costs them more to run the negotiation than it did for
7 you?

8 THE WITNESS: I think I was just
9 responding to Mr. Garrett's question about what the
10 costs to us are of the statutory license. So that is
11 certainly one cost that I would identify of the
12 statutory license. And as I said, it's been a much
13 greater cost than we anticipated just because of
14 having to negotiate with individual companies.

15 MR. STEINTHAL: I had one slightly
16 procedural issue. I had asked earlier, since the
17 witness was referring to some notes as he was going
18 through the testimony, he had some prepared outline,
19 if I could get a copy of that? As long as I can get
20 that.

21 MR. GARRETT: It's not a problem.

22 ARBITRATOR VON KANN: Can we also get a

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1 copy of this, the demonstrative?

2 MR. GARRETT: Sure.

3 CHAIRMAN VAN LOON: We obviously have a
4 long day a head of us tomorrow. I know that some
5 construction delayed people this morning. I would ask
6 that everybody add in an extra 15 minutes early so
7 that we can be ready to roll right at 9 o'clock when
8 we will commence the cross examination of Mr. Marks.

9 Good night. We'll see you in the morning.

10 (Whereupon, at 7:19 p.m., the hearing
11 recessed, to reconvene Tuesday, September 11, 2001 at
12 9:00 a.m.)

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This is to certify that the foregoing transcript in
the matter of: Hearing: Digital Performance Right
 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: September 10, 2001

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



A handwritten signature in dark ink, appearing to be "K. J. [unclear]", is written over a horizontal line.